12-457

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 278.

THOMAS STRUTHERS, PLAINTIFF IN ERROR,

vs.

JOSEPH W. DREXEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED AUGUST 25, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania, wherein Joseph W. Drexel, a citizen of the State of New York, is plaintiff and Thomas S. Blair and Thomas Struthers are defendants, entered at No. 29, May term, 1882, may be found the following words and figures, to wit:

Appearance. Docket Entries.

May Term, 1882.

JOSEPH W. DREXEL, a Citizen of the State of New York,
vs.
THOMAS S. BLAIR and THOMAS STRUTHERS, Citizens of the State of Pennsylvania. } No. 29.

Precipe for summons — case filed March 1, 1882. Same day summons issued, returnable first Monday of March, 1882. 1882, March 2.—Summons served upon Thomas Struthers by leaving a copy at his residence with an adult member of his family. N. E. I. as to other defendant. Mar., $13.72. 1882, April 17.—Rule to declare in one month or judgment issued. 1882, April, 19.—Service of rule to declare accepted by Hampton & Dalzell, Esq'rs. 1882, May
2 24.—Judgment herein against plaintiff in default of a declaration *sec req.* H. D. Gamble, clerk. 1882, May 27.—Affidavit filed and rule granted on defendants to show cause why judgment herein should not be taken off and time allowed plaintiff to declare. Returnable June 9, 1882, at 10 a. m. 1882, May 30.—Service of above rule accepted by S. P. Johnston, Esq. 1882, June 15.—Ordered that judgment of nonsuit herein be taken off and vacated upon condition that plaintiffs pay the costs to this date and file declaration within ten days from this date. 1882, June 15.—Affidavit of plaintiff and declaration filed. 1882, June 26.—Time for filing affidavit of defence extended till August 15, 1882. 1882, August 14.—Affidavit of defence of Thomas Struthers filed. 1882, Dec'r 16.—Rule to plead issued. 1882, Dec. 18.—Service of rule to plead accepted by George Shiras, Jr., Esq., for defendant Struthers. 1883, January 6.—Plea of defendant Struthers filed. 1883, May term.—Trial continued. 1883, June 11.—Rule entered for commission to issue to Charles Dinsmore, at Warren, Pa., to take the deposition of witnesses on part of defendants, with interrogatories filed; also, agreement by plaintiff's attorneys waiving the filing of cross-interrogatories, and agreeing that testimony so taken may be used so far as competent in all the cases in which
3 Struthers is defendant, filed. Same day commission issued. 1883, Nov'r 6.—Rule entered for a commission to issue to David Caldwell, a notary public, at Tyrone, Blair Co., Pa., to take depositions on part of defendant Struthers. Interrogatories and cross interrogatories filed, with stipulation by pl'ff's att'ys as to use of depositions under this rule in other cases. Same day rule — commission with interrogatories issued to com'r named. 1883, Nov'r 10.—Deposition taken under commission issued to David Caldwell

received and notice given counsel. 1883, Nov'r term.—Trial continued, 1883, December 19.—Deposition of J. S. Wallace taken under stipulation of counsel that same be read, so far as applicable, in cases 30 to 35, both inclusive, filed. 1884, May 19.—Case called for trial, jury sworn, and trial proceeded with. May 20.—Trial concluded and verdict rendered by jury in favor of plaintiff for the sum of thirty-four thousand six hundred fifty-one $\frac{36}{100}$ (34,651.36) dollars. Defendants' points filed. 1884, June 23.—Charge of the court filed. 1884, May 27.—Judgment herein upon the verdict. H. D. Gamble, cl'k. 1884, June 3.—Certificates of stock in Blair Iron and Steel Company, numbered, viz., 119, 120, 121, 122, in name of Joseph W. Drexel, together with power of attorney to sell same, filed.
4 1884, June 13.—Bond for writ of error, with approval by M. W. Acheson, dist J., endorsed thereon, filed. 1884, June 13.—Writ of error, returnable in the U. S. Supreme Court at Washington, D. C., second Monday of October next, allowed by M. W. Acheson, dist. J., filed. Same day, citation to defendant in error, returnable on a like day, with writ of error, at same time and place, allowed by same judge. 1884, June 28.—Bill of exceptions, sealed by M. W. Acheson, dist. J., together with assignments of error, filed.

Marginal Entries.

No. 29. May Term, 1882.

Thomas M. Marshall, Hampton & Dalzell, for plaintiff; S. P. Johnston, George Shiras, Jr., for defendant Struthers.

$10 paid clerk.

$11.72 additional deposited by pl'ff Oct. 11, 1882.

5 *Precipe for Summons.*

Circuit Court of the United States. May Term, 1882.

JOSEPH W. DREXEL, a Citizen of the State of New York,
vs.
THOS. S. BLAIR and THOMAS STRUTHERS, Citizens of Pennsylvania. } No. 29.

Issue summons; case returnable at next return day.

THOS. M. MARSHALL,
HAMPTON & DALZELL,
Pl'ff's Atty's.

To H. D. Gamble, Esq., clerk.

Indorsed: No. 29. May term, 1882. Joseph W. Drexel, &c., *vs.* Thos. S. Blair & Thos. Struthers, &c. Precipe for summons. Filed March 1, 1882. Thos. M. Marshall, pl'ff's att'y.

6 *Summons.*

UNITED STATES, }
Western District of Pennsylvania, } *sct:*

The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

We command you that you summon Thomas S. Blair and Thomas Struthers, citizens of the State of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburgh, on the first Monday of March, 1882, to answer to Joseph W. Drexel, a citizen of the State of New York, in an action on the case.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 1st day of March, A. D. 1882, and in the 106th year of the Independence of the said United States.

[SEAL.] H. D. GAMBLE, *Clerk.*

7 Indorsed: No. 29. May term, 1882. Circuit court of the United States. Joseph W. Drexel *vs.* Thomas S. Blair and Thomas Struthers. Summons. Thos. M. Marshall, attorney for plaintiffs.

Service.

March 2, 1882.—Served the within summons upon the within-named Thomas Struthers by leaving a true and attested copy at his residence in Warren, Pa., with an adult member of his family.

JOHN HALL,
U. S. Marshal,
Per M. R. ROUSE, *Dep'ty.*

Sworn and subscribed before me this 2nd day of March, A. D. 1882.

SIMON STRAUSS.

March 6, 1882.—N. E. I. as to Thos. S. Blair.

JOHN HALL,
U. S. Marshal.

8 *Precipe for Appearance for Struthers.*

Circuit Court of the United States. May Term, 1882.

JOSEPH DREXEL
vs.
THOMAS S. BLAIR and THOS. STRUTHERS. } No. 29.

I hereby appear in the above case for Thomas Struthers, one of the above defendants. The clerk will please so enter it of record.
Warren, March 8, 1882.

S. P. JOHNSTON,
Attorney for T. Struthers.

Indorsed: No. 29. May term, 1882. Joseph W. Drexel *vs.* Blair & Struthers. Precipe for appearance. Filed March 10, 1882.

9 *Precipe for Rule to Declare.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOS. W. DREXEL
vs.
THOS. S. BLAIR and THOS. STRUTHERS. } No. 29.

Now, to wit, April 17th, 1882, rule on the plaintiff to declare within one month after notice or judg't of *non pros. sec reg.*

S. P. JOHNSTON,
Att'y for Struthers, Def't.

Indorsed: No. 29. May term, 1882. Jos. W. Drexel *vs.* Thos. Struthers. Rule to declare. Filed April 17, 1882. Johnston.

10 *Rule to Declare.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs.
BLAIR & STRUTHERS. } No. 29.

And now, to wit, April 17, 1882, rule entered in the above-entitled cause upon defendant to declare in one month or judgment *sec. reg.*
From the record.
[SEAL.]

H. D. GAMBLE, *Clerk.*

Indorsed: No. 29. May term, 1882. Appearance docket. Circuit court of the United States, western district of Pennsylvania. Drexel *vs.* Blair & Struthers. Rule to declare. Ap'l 19, 1882. Service accepted. Hampton & Dalzell, att'ys for pl'ff.

11 *Affidavit of Joseph W. Drexel.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs.
BLAIR & STRUTHERS. } No. 29.

Joseph W. Drexel, the plaintiff, being duly sworn according to law, deposes and says that the defendants above named are justly and truly indebted to him in the sum of $31,870.52, being the amount paid by him for four hundred shares (400) of the capital stock of the Blair Iron and Steel Company, a corporation organized under the laws of Pennsylvania, with seven per cent. interest per annum from the dates of the payments by him made upon said stock. Deponent attaches hereto and makes part hereof an exhibit, marked "A," showing the various payments made by him on said stock and the dates thereof, and the calculations of interest on said payments, which he says is true and correct in every particular. Said indebtedness arose as follows: On April 4, 1873, the said defendants executed and delivered to said deponent a certain agreement in the words and figures following, viz:

12 "Whereas Joseph W. Drexel has purchased four hundred shares (400) of the stock of the Blair Iron and Steel Company at the price of fifty dollars per share, and sold by A. S. Diven, trustee of said company: Now we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said Jos. W. Drexel shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price and pay to him the amount paid by him on the same, with interest at the rate of seven per cent. per annum.

"New York, April 4th, 1873.

"THOS. S. BLAIR.
"T. STRUTHERS."

In consideration of the foregoing agreement deponent subscribed for and took and paid for four hundred (400) shares of said company's stock, as shown by Exhibit "A" aforesaid. Subsequently and at the time named therein said defendants executed and delivered to deponent an agreement in the words and figures following, viz:

"NEW YORK, *March 22d*, 1875.

"In consideration of the waiver by Joseph W. Drexel of the right of election to sell to us the four hundred (400) shares of stock in the Blair Iron & Steel Company (subscribed and paid for by him),

13 as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4th, 1876. If he shall at that time elect to sell to us the four hundred (400) shares so subscribed and held by

him we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent per year from the date of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of Joseph W. Drexel four hundred shares of the stock of the said Blair Iron & Steel Company to be held by him in trust for that purpose.

"THOS. S. BLAIR.
"THOMAS STRUTHERS."

Subsequently and at the time named therein deponent caused to be served upon said defendants a notice in the words and figures following, viz:

NEW YORK, *March* 20, 1876.

GENTLEMEN: I hereby notify you that I desire to sell the four hundred (400) shares of the stock of the Blair Iron and Steel Company held by me under the options of sale according to the terms of the agreement between you and J. P. Morgan and J. W.
14 Drexel of April 4, 1873, and the several renewals thereof.

You are hereby notified that I am ready to transfer the stock to you, or to any person or persons whom you may designate, upon the payment of the purchase-money thereof and seven per cent. interest thereon from date of payment.

I hereby tender you the certificates of stock, and I demand fulfilment of your contract in the premises. I am ready and willing at any time to transfer the stock upon the books of the company, and fully perform the conditions of recision of purchase.

Respectfully, JOS. W. DREXEL.

To Mess. Thos. S. Blair and T. Struthers.

Deponent further avers that on the 4th day of April, 1876, he did, by his agent duly constituted, tender to said defendants the transfer of stock in said foregoing papers referred to, and produced the certificates therefor, both the stock purchased and the stock held as collateral, and asked defendants to receive the same, and to pay to deponent the price thereof and interest as provided by the said agreements hereinbefore recited, which they absolutely refused to do.

That said Blair Iron & Steel Company is wholly insolvent, and that by reason of defendants' refusal to carry out their said contract with deponent he has suffered and is entitled to recover from
15 them damages to the amount of $31,870.52, as herein before stated.

JOS. W. DREXEL.

Sworn and subscribed before me this 31st day of May, 1882.

B. AYMAR SANDS,
Notary Public, New York State, New York County.

EXHIBIT "A."

Statement of Payments Made by J. W. Drexel on Account of Subscription to Blair Iron & Steel Co. Stock Under Blair & Struthers' Guarantee.

1873.		
April 18		$6,666 67
Oct. 15		2,000 00
1874.		
Feb'y 18		2,000 00
April 10		4,333 33
June 1		5,000 00
Interest on $6,666.67, April 18, 1873, to June 1, 1874, 1 yr. 1 mo. 12 days, at 7%	521 06	
Interest on 2,000, October 15, 1873, to June 1, 1874, 7 mo. 16 days, 7%	87 89	
Int. on 2,000, Feb'y 18, 1874, to June 1, 1874, 3 mo. 10 days, 7%	38 89	
Interest on 4,333.33, Ap'l 10, 1874, to 1 June, 1874, 1 month 20 days, 7%	42 12	
Interest on $20,000, June 1, 1874, to May 25, 1882, 7 years 11 months and 25 days	11,180 56	
		11,870 52
		31,870 52

Indorsed: No. 29. May term, 1882. Affidavit of Joseph W. Drexel. Filed June 15, 1882.

16 *Declaration.*

UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } ss:

In the Circuit Court of the United States for the Western District of Pennsylvania.

JOSEPH W. DREXEL *vs.* BLAIR & STRUTHERS.

Thomas Struthers, defendant, who was impleaded with Thos. S. Blair, citizens of the State of Pennsylvania, were summoned to answer Joseph W. Drexell, the plaintiff, citizen of the State of New York, of a plea of trespass on the case; whereupon said plaintiff, by Thos. M. Marshall and Hampton & Dalzell, his attorneys, complains of the said defendant—

For that whereas heretofore, to wit, on the 4th day of April, A. D. 1873, at New York, to wit, in the western district of Pennsylvania aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would take and pay for, at the rate of $50.00 per share, four hundred (400) shares of the capital stock of the Blair Iron and Steel Company, a corporation organized under the laws of Pennsylvania, they, the said defend-

ants, undertook, and then and there faithfully promised the
17 said plaintiff, that if at the end of one year from said date he, the said plaintiff, should desire to sell the said shares at the said price by him paid for the same they, the said defendants, would purchase the said shares of the said stock, to wit, four hundred shares of the said Blair Iron and Steel Company, at the said price, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per centum per annum.

And the said plaintiff avers that he, confiding in the said promises and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, take and pay for four hundred (400) shares of said stock aforesaid, at the rate of $50.00 per share, amounting in all to a large sum, to wit, the sum of twenty thousand dollars ($20,000).

And the said plaintiff further avers that at divers times subsequently, to wit, on the 4th day of April, A. D. 1874, and, to wit, on the 4th day of April, A. D. 1875, in consideration that the said plaintiff, at the special instance and request of the said defendants, would waive his right of election to sell to the said defendants the said shares of the capital stock of the said Blair Iron and
18 Steel Company, to wit, four hundred (400) shares thereof, they, the said defendants, undertook, and then and there promised faithfully the said plaintiff, that if at the end of one year from the said last-mentioned dates, respectively, to wit, April 4th, A. D. 1874, in the first instance, and April 4th, A. D. 1875, lastly, he, the said plaintiff, should desire to sell the said hereinbefore-mentioned shares at the said price by him paid for the same they, the said defendants, would purchase the said shares of the said stock at the said price paid by him, the said plaintiff, paid therefor, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per cent. per annum.

Yet the said defendants, not regarding their said promises and undertakings, although often requested so to do, and although the said stock was by the said plaintiff tendered to the said defendants, to wit, on the day and year aforesaid, to wit, at the district aforesaid, have not as yet paid to the said plaintiffs the said sum of twenty thousand dollars ($20,000.00), but have hitherto wholly neglected and refused, and do still refuse and neglect, to wit, at the western district of Pennsylvania, to the damage of the plaintiff thirty thousand dollars.

19 And the said plaintiff further complains of the said defendants for that whereas heretofore, to wit, on the 4th day of April, A. D. 1876, to wit, at the western district of Pennsylvania, the said defendants bargained for and bought of the said plaintiffs, at the special instance and request of the said defendants, and the said plaintiff then and there sold to the said defendants, a large quantity of goods, to wit, four hundred (400) shares of the capital stock of the Blair Iron and Steel Company, at the rate or price of $50.00 per share, with seven per cent. interest added from April 4th, A. D. 1873, to be delivered by the said plaintiff to the said defend-

ants, and to be paid for by the said defendants to the said plaintiff on the delivery thereof as aforesaid, and in consideration thereof, and that the plaintiff, at the like special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to deliver the said stock to the said defendants in the time and at the place aforesaid, they, the said defendants, undertook, and then and there faithfully promised the said plaintiff, to accept the said stock of and from him, the said plaintiff, and to pay for the same on the delivery to them, the said defendants, as aforesaid.

20 And though the said plaintiff afterwards, to wit, on the day and year aforesaid, to wit, at the western district of Pennsylvania aforesaid, was ready and willing and then and there tendered and offered to deliver the said stock to the said defendants, and then and there requested the said defendants to accept the same and to pay him therefor as aforesaid, yet the said defendants, not regarding their said promises and undertakings, but contriving and craftily and subtily intending to deceive and to defraud the said plaintiff in this behalf, did not nor would at the time when they were so requested as aforesaid, or at any time before or afterwards, accept the said stock or any part thereof of or from the said plaintiff or pay him for the same as aforesaid; but then and there wholly neglected and refused so to do, to the damage of the plaintiff thirty thousand dollars;

And whereas also the said defendants afterwards, to wit, at the district aforesaid, on the day and year aforesaid, were indebted to the said plaintiff in the sum of twenty thousand dollars for divers shares of the capital stock of the Blair Iron and Steel Company by the said plaintiff before that time bargained and sold to the said defendants, at their special instance and request, and, being

21 so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested;

And whereas the said defendants afterwards, to wit, were indebted to said plaintiff in the sum of twenty thousand dollars ($20,000.00) for so much money by the said defendants before that time had and received to and for the use of the said plaintiff, and, being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested;

And whereas also the said defendants afterwards, to wit, in the day and year aforesaid, to wit, at the district aforesaid, were indebted to the said plaintiff in the sum of twenty thousand dollars for so much money by the said plaintiff before that time paid,

22 laid out, and expended to and for the use and benefit of the

said defendant, at his like special instance and request, and being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested;

And whereas also the said defendants afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, were indebted to the said plaintiff in the sum of twenty thousand dollars for so much money by the said plaintiff before that time lent and advanced to the said defendants at their special instance and request, and being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested:

Nevertheless the said defendants, not regarding their said
23 several promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff, although they, the said defendants, afterwards, to wit, on the day and year last mentioned, to wit, at the district aforesaid, were requested by the said plaintiff so to do, but the said defendants to pay him the same hath hitherto wholly neglected and refused and still do neglect and refuse, to the damage of the said plaintiff thirty thousand dollars ($30,000.00); and therefore he brings this suit.

THOS. M. MARSHALL,
HAMPTON & DALZELL,
Att'ys for Pl'ff.

Indorsed: No. 29. May term, 1882. Jos. W. Drexel *vs.* Blair & Struthers. Narr. Filed June 15, 1882. H. & D.

24 *Affidavit of Defence.*

Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs.
THOMAS S. BLAIR and THOMAS STRUTHERS. } No. 29.

Affidavit of defence by Thomas Struthers, in his own behalf.

STATE OF PENNSYLVANIA, }
Warren County, } *ss:*

Thomas Struthers, being duly sworn, saith that he has a just and legal defence to the whole of plaintiff's declaration and affidavit of cause of action in this case, the nature and character of which is as follows:

First. The consideration mentioned in the agreement bearing date April 3, 1873, a copy of which is purported to be given in

plaintiff's affidavit, on which this suit is brought, was never paid, nor was any valid consideration paid or given, or agreed to be paid or given, to defendants therefor; neither was there any such consideration for the agreement of 1874, referred to in plaintiff's affidavit, nor for the agreement of March 22nd, 1875, a copy of which is purported to be given in plaintiff's affidavit.

25 Second. That the agreement of April 4, 1873, out of which spring the extensions of 1874 and 1875, on the latter of which this suit is brought, is usurious, in that it constitutes a mere device for obtaining to said plaintiff more than the legal interest for money by said plaintiff advanced and to be advanced to the Blair Iron & Steel Company. On the advancement of fifty dollars ($50.00) per share by plaintiff to the Blair Iron and Steel Company the agreement places in his hands four hundred (400) shares of the stock of said company, with the privilege of determining, at the end of a year, whether he will hold the same as a purchase at that price or treat the money advanced thereon as a loan, at seven per cent. interest, and hold said shares as security for the repayment of the money so advanced, and interest thereon, at the end of the year. And, to insure the certain repayment of said money so advanced, and interest thereon at said rate of seven per cent. per annum, in case said plaintiff shall, in the exercise of his right of election, determine it a loan, it makes the defendants obligors for the repayment of the same, with the stipulated seven per cent interest thereon.

Said stock might, and was expected to, yield and pay
26 dividends within the year and to appreciate largely in value, and the chance was thus secured to the plaintiff of realizing to himself by such dividends and by continuing to hold the shares as investment, or by sale thereof at greatly improved and enlarged prices, a much larger compensation than seven per cent. for the money so advanced. The said plaintiff, having elected to treat the advancement as a loan, thereby subjects himself to the laws of the State of New York, where said agreement was made, in respect to the loan of money. This form of agreement was used as a proper mode of getting the stock into the hands of the plaintiff, to be held absolutely, if he should so elect, or to be held as security collateral to the obligation of said Blair & Struthers for the return or repayment of the money so advanced, with seven per cent. interest, in case he should elect to determine it a loan; and securing, as it purports to do, the certain return to the plaintiff of the money so advanced and made a loan by his election, with the highest rate of interest allowed by the laws of said State of New York, and in addition thereto the chance and probability of a much larger sum than the principal sum and legal interest thereon, said agreement is in contravention of said laws of the State of New
27 York and usurious and void, as this affiant is advised and believes.

Third. The plaintiff did not tender to this defendant by proper transfer and delivery, on the 4th day of April, 1876, the four hundred shares of stock mentioned and referred to in plaintiff's affidavit, neither did he tender to this defendant by proper transfer and

delivery, on the 4th day of April, 1876, the four hundred shares of said stock mentioned and referred to in plaintiff's affidavit as being held as collateral security, and to the best of his information and belief no such tender was made to Thos. S. Blair at that time.

THOMAS STRUTHERS.

Sworn & subscribed before me this 14th day of August, 1882.

H. D. GAMBLE,
Clerk U. S. Circuit Court, W. D. of Pa.

Indorsed: No. 29. May term, 1882. Joseph W. Drexel *vs.* Thos. S. Blair and Thomas Struthers. Affidavit of defence by Thomas Struthers in his own behalf. Filed Aug. 14, 1882.

28 *Precipe for Rule to Plead.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

DREXEL
vs.
BLAIR & STRUTHERS. } No. 29.

And now, to wit, Dec'r 16, 1882, enter rule in the above-entitled case upon defendants to plead in one month or judgment *sec reg.*

Dec. 16, 1882.

HAMPTON & DALZELL,
Att'ys for Pl'ff.

To H. D. Gamble, cl'k.

Indorsed: No. 29. May term, 1882. Appearance docket. Circuit court of the United States, western district of Pennsylvania. Drexel *v.* Blair & Struthers. Precipe for rule to plead. Filed Dec'r 16, 1882.

29 *Rule to Plead.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

DREXEL
vs.
BLAIR & STRUTHERS. } No. 29.

And now, to wit, Dec'r 16, 1872, rule entered in the above-entitled case upon defendant, Thos. Struthers, to plead in one month or judgment *sec reg.*

From the record.

[SEAL.] H. D. GAMBLE, *Clerk.*

Indorsed: No. 29. May term, 1882. Appearance docket. Circuit court of the United States, western district of Pennsylvania. Drexel *vs.* Blair & Struthers. Rule to plead. Service accepted. Geo. Shiras, Jr., att'y for T. Struthers. Dec. 18, 1882.

30 *Pleas.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1884.

JOSEPH W. DREXEL
vs.
BLAIR & STRUTHERS. } No. 29.

And the said Thomas Struthers, by his attorneys, comes and defends the wrong and injury when, &c., and says he did not undertake or promise in manner and form as the said Joseph W. Drexel hath in his declaration thereof complained against him, the said Thomas Struthers, and of this he, the said Thomas Struthers, puts himself upon the country.

And for a further plea in this behalf as to all the counts of the said declaration, the said Thomas Struthers by leave of the court here for this purpose first had and obtained, says that the said Joseph W. Drexel ought not to have or maintain his aforesaid action thereof against him, because he says the consideration mentioned in the alleged agreement referred to in plaintiff's declaration bearing date April 4, 1873, was never paid, nor was any valid consideration paid or given, or agreed to be paid or given, to defendants therefor; neither was there any valid consideration paid
31 or given, or agreed to be paid or given, for the alleged agreement of 1874 referred to in plaintiff's declaration, nor for the alleged agreement of March 22nd, 1875, referred to in said declaration, and a copy of which is purported to be given in plaintiff's affidavit of claim, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said Joseph W. Drexel ought to have or maintain his aforesaid action thereof against him, &c., and of this the said Thomas Struthers puts himself upon the country.

And for a further plea in this behalf to all the counts of the said declaration the said Thomas Struthers, by like leave of the court for this purpose first had and obtained, says that the said Joseph W. Drexel ought not to have or maintain his aforesaid action thereof against him, because he says that heretofore, to wit, on the 4th day of April, A. D. 1873, in the city of New York and State of New York, it was corruptly and against the statute in such case made and provided agreed by and between the said plaintiff and the said defendants in the alleged agreement of that date, a copy of which is set forth in the plaintiff's affidavit of claim, out of which spring the alleged agreements of 1874 and 1875, and said al-
32 leged agreement was usurious in that it constituted a mere device or contrivance for obtaining to said plaintiff more than the legal interest for money by the said plaintiff advanced and to be advanced to the Blair Iron and Steel Company. On the advancement of fifty dollars per share by the plaintiff to the Blair Iron and Steel Company the alleged agreement places in his hands four hundred shares of the stock of said company, with the privilege of determining at the end of a year whether he will hold the same as a

purchase at that price or treat the money advanced thereon as a loan, at seven per cent. interest, and hold said shares as security for the repayment of the money so advanced, and interest thereon at the end of the year, but to insure the certain repayment of said money so advanced, and interest thereon at the said rate of seven per cent. per annum, in case said plaintiff shall, in the exercise of his right of election, determine it a loan, it makes the defendants obligors for the repayment of the same, with seven per cent. interest thereon. Said stock might and was expected to yield and pay dividends within the year and to appreciate largely in value, and the chance was thus secured to the plaintiff of realizing to himself by such divi-
33 dends, and by continuing to hold the shares as an investment or by sale thereof at greatly improved and enlarged prices, a much larger compensation than seven per cent. for the money so advanced. The said plaintiff, having elected to treat the advancement as a loan, thereby subjects himself to the laws of the State of New York, where said alleged agreement was made in respect to the loan of money. This form of agreement was used as a proper mode of getting the stock into the hands of the plaintiff, to be held absolutely if he should so elect or to be held as a security collateral to the obligation of said Blair and Struthers for the return or repayment of the money so advanced, with seven per cent. interest, in case he should elect to determine it a loan, and securing, as it purports to do, the certain return to the plaintiff of the money so advanced and made a loan by his election, with the highest rate of interest allowed by the laws of said State of New York, and in addition thereto the chance and probability of a much larger sum than the principal sum and legal interest thereon. Said alleged agreement is in controvention of said laws of the said State of New York and usurious and void, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said Joseph W. Drexel ought to have or maintain his aforesaid action thereof against him,
34 &c., and of this the said Thomas Struthers puts himself upon the country.

And for a further plea in this behalf as to all the counts in the said declaration the said Thomas Struthers, by like leave of the court here for this purpose first had and received, says that the said Joseph W. Drexel ought not to have or maintain his aforesaid action thereof against him, because he says the plaintiff did not tender to the said defendant, or either of them, by proper transfer and delivery on the fourth day of April, 1876, the four hundred shares of stock referred to in plaintiff's declaration; neither did he tender to the defendants, or either of them, by proper transfer and delivery on the fourth day of April, 1876, the four hundred shares of said stock referred to in plaintiff's declaration as being held as collateral security, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said Joseph W. Drexel ought to have or maintain his aforesaid action thereof against him, &c., and of this the said Thomas Struthers puts himself upon the country.

And for a further plea in this behalf as to all the counts of the said declaration the said Thomas Struthers, by leave of the court

for this purpose first had and obtained, says that the said Joseph W. Drexel ought not to have or maintain his aforesaid action thereof against him, because he says that the said alleged agree-
35 ment of April 4th, 1873, referred to in said declaration, out of which the said alleged agreements of 1874 and 1875 arise, is against public policy and good morals and a fraud upon the subscribers or purchasers of other portions of said six thousand shares of the stock of the Blair Iron and Steel Company so offered for sale by A. S. Diven, trustee for said company, in that it gave the said Joseph W. Drexel, while acting with the other subscribers or purchasers of the said stock of the Blair Iron and Steel Company, being a matter in which they had a common interest, the chance or means of receiving to himself a profit or advantage over said other subscribers or purchasers by a secret or undisclosed agreement, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said Joseph W. Drexel ought to have or maintain his aforesaid action thereof against him, &c., and of this the said Thomas Struthers puts himself upon the country.

And for a further plea in this behalf as to all the counts of the said declaration the said Thomas Struthers, by leave of the court here for this purpose first had and obtained, says that the said Joseph W. Drexel ought not to have or maintain his aforesaid action thereof against him, because he says that the alleged agreement of April 4, 1873, referred to in the plaintiff's declaration,
36 with the power therein provided to elect to determine it a loan, as he subsequently did by the exercise of said power, constituted a loan of the money to the Blair Iron and Steel Company, with a pledge of the stock as collateral security for said loan, with Blair and Struthers as guarantors. The consideration mentioned in said alleged agreement was never paid to defendants, or either of them, for their said guarantee, and it is therefore void, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said Joseph W. Drexel ought to have or maintain his aforesaid action thereof against him, &c., and of this the said Thomas Struthers puts himself upon the country, &c.

And for a further plea in this behalf as to all the counts of the said declaration the said Thomas Struthers, by leave of the court here for this purpose first had and obtained, says that the said Joseph W. Drexel ought not to have or maintain his aforesaid action thereof against him, because he says that the said cause or several causes of action in the declaration mentioned did not, nor did any or either of them, accrue to the plaintiff at any time within six years next before the commencement of this suit, and this the said Thomas Struthers is ready to verify; wherefore he prays
37 judgment if the said Joseph W. Drexel ought to have or maintain his aforesaid action thereof against him, etc., and of this the said Thomas Struthers puts himself upon the country, &c.

GEORGE SHIRAS, JR.,
JOHNSTON, LINDSEY & PARMLEE, AND
BROWN & STONE,
Att'ys for Thomas Struthers.

Indorsed: No 29. May term, 1882. Joseph W. Drexel *vs.* Blair & Struthers. Pleas. Filed Jan'y 6, 1883.

38 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs.
THOMAS STRUTHERS, Impleaded with THOMAS S. BLAIR. } No. 29.

May 19, 1884.—Case called for trial and following jury sworn: Joseph Alexander, John P. Wharton, W. Trout, Hugh Boyd, Andrew Jackson, John McEldowney, R. M. Graham, John V. Humes, David Hootman, Edward Dillon, C. G. Christie, and J. D. Bowman. John Dalzell, Esq., opens case for plaintiff and offers evidence; closes, and court adjourns.

May 20.—George Shiras, Jr., Esq., opens case and offers evidence on behalf of defendants. Whereupon the court charges the jury, who retire, and, after due deliberation, return and find for the plaintiff the sum of $34,651.36.

H. D. GAMBLE, *Clerk.*

May 27, 1884.—Judgment upon the verdict.

H. D. GAMBLE, *Clk.*

39 *Judgment Docket Entry.*

No.—29.
Term—May.
Year—1882.
Defendant—Thomas Struthers.
Plaintiff—Joseph W. Drexel.
Date—May 27, 1884.
Am't—[$]34,651.36.
Costs— ——.
Remarks—John Dalzell. Thos. M. Marshall.

40 *Defendant's Prayers for Instructions.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs.
THOS. STRUTHERS. } No. 29.

The defendant's counsel requests the court to charge the jury—

1st. That if the consideration named in the contract of April, 1873, was not, in point of fact, paid, and if no further or other consideration was paid or given for the subsequent extensions of the said contract, the plaintiff cannot recover, and the verdict of the jury should be for the defendant.

2nd. That, as the evidence does not disclose the receipt of money, or any other valuable consideration by the defendant beyond the nominal consideration of one dollar, but merely discloses the breach, by defendant of an express contract for the purchase of stock by the defendant from the plaintiff, such evidence does not sustain the common counts in the plaintiff's declaration, and the verdict of the jury should be for the defendant.

3rd. The mere breach of an unexecuted contract for the
41 purchase of stock in a corporation, the contract itself being in writing and the consideration named therein being merely a nominal one, does not sustain the common counts in the plaintiff's declaration contained, and the verdict of the jury should be for the defendant.

4th. If the court refuse to charge as requested in the foregoing points, then the court is requested to charge that if the plaintiff, at the instance and request of said defendant, subscribed and paid for capital stock in the Blair Iron and Steel Company, and took a contemporaneous agreement from the defendants that the latter would purchase the said stock from the said plaintiff at the end of the year if the latter should so desire, and repay him the amount advanced by him, with 7 per cent. interest, and if the plaintiff elected to tender said stock and demand a repayment of the money, with 7 per cent., then such arrangement or agreement was an usurious one, and, under the statute of New York in such case made void.

5th. If the court refuses to charge as requested in the 4th point, then the court is requested to charge that if the jury find that the arrangement or contract was that the plaintiff would sub-
42 scribe and pay for the stock if the defendant would agree to purchase it from him if he, the plaintiff, so desired, at the end of a year, and repay him the amount advanced, with legal interest, and if they find that the plaintiff elected to surrender the stock and demand his money, with interest, then such contract would, in point of law, be usurious and void.

6th. The court is requested to charge that the tender made to defendant Struthers on the 4th day of April, 1876, was premature and inefficacious.

7. That if the jury find under the evidence that at the time of the tender of the stock on April 4th, 1876, Wallace, plaintiff's agent, in making the tender demanded of and from the defendant a sum of money largely in excess of what he had a right to demand and of what defendant had agreed to pay, then such excessive demand vitiated the tender and rendered it of no effect.

8th. That under the pleadings and evidence the plaintiff is not entitled to recover, and the verdict must be in favor of the defendant.

Indorsed: No. 29. May 7, 1882. Joseph W. Drexel *vs.* Thomas Struthers *et al.* Defendants' prayers for instructions. Filed May 20, 1884. Shiras, Brown & Lindsay.

43 *Charge of the Court.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs.
THOMAS STRUTHERS, Impleaded, &c. } No. 29.

Verbal charge of the court (Bradley, justice).

GENTLEMEN OF THE JURY: This is an action brought by the plaintiff, J. W. Drexel, against the defendant, Thomas Struthers, who is impleaded with Thomas S. Blair. Mr. Blair not having been served with process in the case, the suit proceeds against Mr. Struthers alone. The action is brought for the amount of money that the plaintiff paid for 400 shares of stock in 1873 under an agreement which reads as follows:

"Whereas Joseph W. Drexel has purchased 400 shares of the stock of the Blair Iron and Steel Company at the price of fifty dollars ($50.00) per share, and sold by A. S. Devin, trustee of said company: Now we, the undersigned, in consideration of one dollar ($1.00) to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said
44 Drexel shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price, and pay to him the amount paid by him on the same, with interest at the rate of 7 per cent. per annum.

"New York, April 4th, 1873.

"(Signed) THOMAS S. BLAIR.
"T. STRUTHERS."

That agreement, the court instructs you, is a valid agreement on its face. The consideration of one dollar ($1.00) is named in it. There may have been other considerations besides that. From the fact that the agreement begins by reciting "Whereas Joseph W. Drexel has purchased 400 shares of the stock of the Blair Iron and Steel Company at the price of fifty dollars ($50.00) per share: Now, we, the undersigned, in consideration of one dollar ($1.00)," &c., it is very probable there were other considerations for making it, but you are to take the agreement on its face, and on its face the consideration is but one dollar ($1.00); still, that is sufficient to make it a valid and binding agreement. In the first place, the plaintiff has offered evidence to show (you will judge whether it is proved or not) that the amount paid for the stock by him was the par value of the shares, which would be $20,000. I think the evidence of the secretary and treasurer is to the effect that the amount of
45 money was received by the company for the stock; so that the amount is fixed and determined, if that is true, at $20,000.

"If Mr. Drexel desires at the end of one year from this date to sell said shares we will purchase the same at that price and pay the amount paid by him on the same, with interest at 7 per cent. per

annum." Now, at the end of one year, or about that time, as you have heard, that agreement was extended for another year by a paper which is not in evidence. The testimony, I think, of Mr. Miller, is that that was executed on the third or fourth of April, 1874, in Pittsburgh. You are the judges of that. The final extension, made in 1875, admits the fact that it had been extended in 1874 for another year, and the extension of 1875 is before us and reads as follows:

"NEW YORK, *March 27th*, 1875.

"In consideration of the waiver of Joseph W. Drexel of the right of election to sell to us the 400 shares of stock in the Blair Iron and Steel Company subscribed and paid for by him, as he was entitled to by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4th, 1875, we do hereby agree that his right to do so shall be extended for another year, namely, to April 4th, 1876. If he shall at that time elect to sell us the 400 shares
46 so subscribed and held by him we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent. per annum from the date of the payments by him of the respective installments thereon." It then speaks of collateral security that was left by him. This extension appears from the face of it to be made at the instance and request of Blair and Struthers. Mr. Drexel's right would have accrued on the fourth of April, 1875, but by this extension it was carried on and extended to the fourth of April, 1876. Now, what would be the duty of Mr. Drexel under this agreement if he desired to have them take the stock? Why, to speak in common language, we would say his duty was to offer it to them, and to tell them that he wanted them to take it. That is the plain common sense of it. The question is, then, whether he did make the offer and did express to them his desire to sell the stock on the 4th of April, 1876, for they fix that date in this last extension when the election was to be made. You have the evidence of Mr. Marshall, who was the attorney of Mr. Drexel, that on the third of April, I think it was, he sent a messenger, a student-at-law in his office, with the certificates for four hundred shares held by Drexel, and those held by other persons, friends of
47 Drexel, and with the certificates for the 1,550 shares of stock that the plaintiff held as collateral security for the fulfilment of the agreement for himself and, as it appears, for the others who held stock in the same way and who were friends of his. The receipt that Mr. Drexel gave to Mr. Struthers when he made the last extension and when he got the 1,550 shares as collateral reads as follows:

"MARCH 22ND, 1875.

"Received of Thomas Struthers, Esq., certificate number 137 for 1,450 shares and certificate number 61 for 100 shares, being in all 1,550 shares, in the Blair Iron and Steel Company, which I hold in trust for Charles G. Franklin, 250 shares; E. E. Gardiner, 200 shares; J. W. Drexel, 400 shares; J. P. Morgan, 400 shares; B. K. Goodwin, 200 shares; C. H. Davipey, 100 shares, making in all 1,550 shares,

to be held as callateral security for the extension of right to call on T. S. Blair and Thomas Struthers to purchese a similar amount of said stock, said extension to be for one year, as per previous agreement.

"(Signed) JOSEPH W. DREXEL."

That receipt Mr. Drexel gave to Mr. Struthers. Now, on the third of April, 1876, the day before the time came for the election
48 by Mr. Drexel to sell the stock, it seems Mr. Marshall gave all those certificates—Mr. Drexel's four certificates for one hundred shares each, and the other two certificates as collateral—to Mr. Wallace, and also gave to him the certificates held by these other persons at the same time to make a demand for them. Mr. Marshall states he also gave Mr. Wallace a power of attorney from Drexel to transfer stock of the Blair Iron and Steel Company in blank, leaving the amount in blank, to be tendered to Mr. Struthers. Those were the instructions. And he also sent with the papers a request in writing from Mr. Drexel, addressed to Mr. Blair and Mr. Struthers, asking them to take his stock; it is not necessary for me to read the whole of that paper. Mr. Wallace was not here as a witness to tell what he did, but he was examined through a commission, which is a disadvantageous way of taking testimony. He was examined on interrogatories, and testified in substance, as I recollect (you will remember whether I state it right or not) that he went on the 4th of April, 1876, to Warren, where Mr. Struthers resided; called at his house and at first could not find him in; then he went in the evening and saw Mr. Struthers, and you heard what he stated in regard to what occurred at that time. As that evidence is material I will take the liberty of reading the deposition.
49 He states: "I went to Warren, Pa., in April of 1876, at the instance of Thomas M. Marshall, to see Mr. Thomas Struthers. I saw him and tendered to him certain stock certificates given me by Mr. Thomas M. Marshall and demanded the return of the money which these defendants, Thomas Struthers and Thomas S. Blair, had borrowed from the plaintiff, J. W. Drexel. I went for the purpose of demanding the money at the request of Mr. Marshall." To the next interrogatory he said: "I saw Mr. Thomas Struthers at Warren; it was about the middle of the month of April, 1876; it was either on the 15th or 16th of the month. I met him at his house in the evening. I told him what I came for, and presented him his stock certificates and asked him to return to me the money which these defendants had borrowed from J. W. Drexel. I said to him, Mr. Struthers, will you give me the money for these certificates. To which he replied, 'I will not.' I then put the certificates in my pocket and went down to the hotel. I took the certificates for 1,550 shares of the capital stock of the Blair Iron and Steel Company with me to Warren, and, I think, a power of attorney authorizing me to transact the business. On my return I gave them to Mr. Marshall." Then he further states that he made a memorandum of exactly what took place on that occasion be-
50 tween him and Mr. Struthers, but that was not compe-

tent evidence, and, on the objection of the defendants' we ruled it out. Now, it is said there is no evidence given by Mr. Wallace that he showed this letter of Mr. Drexel to Mr. Struthers, or read it to him, but he states he demanded the money, and this letter is a demand of the money, and as the papers were all together it is for you to say whether it is not a fair inference that the mode in which he demanded the money was not both by his mouth and by showing this paper demand for it. I shall come to what Mr. Struthers says on the subject directly, but before getting to that I have a word to say with regard to the effect of the presentation of these certificates and of the blank power of attorney, supposing they were tendered to Mr. Struthers, as Mr. Wallace in his testimony says he did tender them. The certificates of stock read as follows:

"Blair Iron and Steel Company.

"This is to certify that Joseph W. Drexel is entitled to one hundred shares, $100 each, of the capital stock of the Blair Iron and Steel Company, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate."

51 That is signed by the officers of the company. Now, here is a power of attorney which would enable any person with the certificate in his possession to transfer those shares on the books, and we instruct you as a matter of common knowledge that that is the form in which stock is usually sold and delivered—by delivering the certificates and power of attorney, either in blank or filled up. If it is blank it is for the party who has the certificate to fill it up; if it is filled up nothing more is required. I suppose millions of dollars of stock every day in New York are sold in that way—by simply delivering the certificates and power of attorney. On many certificates of stock there is a power of attorney at the bottom, and the man whose name the stock is — just signs his name to that blank power of attorney, and the certificate passes around from hand to hand, perhaps through a dozen hands, all ready to be transferred with that blank power of attorney signed by the person in whose name the stock is. That is the ordinary way of selling stocks, I think I may say in this country; it certainly is so in New York and all places that I am acquainted with. If that evidence of Mr. Wallace is true then there was a tender to Mr. Struthers of the stock, for tendering the certificates with the blank power of attorney to transfer them on the books of the company is equivalent
52 to the tender of the stock. But Mr. Struthers' account of that transaction differs somewhat from Mr. Wallace's. He admits that Mr. Wallace was there that day, and he had papers, and that he read to him the contract, although he didn't hear much of it. Still he does not say he did not know what it all meant, and the inference is that he did understand what the thing meant, except this: Mr. Struthers says that Mr. Wallace told him that the amount for him to pay was $300,000. Now, Mr. Wallace says twice in his deposition that what he wanted was Mr. Drexel's money. That was not

$300,000, but was simply the amount of that 400 shares of stock. We can only account for that discrepancy upon the ground, as we all know, that after a great many years have elapsed people will forget some of the incidents that occurred in an interview. You are to take all the circumstances under consideration. You will bear in mind the fact that Mr. Wallace went there with these papers and a duty to perform; he was under instructions, and you are to infer from his testimony and that of Mr. Struthers together whether he complied with his instructions or not. Supposing that he did comply with his instructions, then did it become the duty of Mr. Struthers to pay the amount represented by the stock?

53 If it did become his duty to pay that money, then we instruct you that the declaration in this case (what we call the common money counts) is sufficient to enable him to recover. When parties have made a contract by which certain things are to be done on one side and certain things on the other, if one party does all those things that are required to be done by him to entitle him to a sum of money from the other party, he may recover that sum of money under the common money counts. We instruct you, therefore, that, so far as the pleadings are concerned, there is no difficulty in the plaintiff recovering under the declaration a verdict for the amount that is due him. The question is whether it was the duty of Mr. Struthers when that stock was proffered to him to pay for it, and we instruct you that it was, if you believe that the stock was tendered to him on that day, unless the whole contract was void because of usury, which is another point that is made by the defendants.

On that subject we are obliged to speak from the face of the papers themselves. We have nothing else to go upon. The plaintiff offered to prove the original negotiations between the parties. The defendants objected, and the question of usury not having

54 been brought forward at that time, we ruled it out, so that that testimony is not before us now. On the face of the papers the question is whether there was any loan at all. There is no usury unless there is a loan of money, and the question is whether this transaction involved a loan, or attempted loan of money. We have looked at these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan money, between the plaintiff and the defendant, whereby usury could arise. It is our duty to give you instructions on that subject and we say to you that upon that point the defence of the defendants must fail. These are all the remarks that we think necessary to make to you and you will make up your minds from the evidence, under these instructions.

(Defendants' counsel except to those portions of the charge in which it is stated the common counts are sufficient; that upon the face of the papers the question of usury does not arise, and to the refusal of the defendants' point that the plaintiff is not entitled to recover under the pleadings in evidence.)

Endorsed: No. 29. May term, 1882. Joseph W. Drexel *vs.* Thomas Struthers. Charge. Filed May 23, 1884.

55 *Bill of Exceptions.*

Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs. } No. 29.
THOMAS STRUTHERS, Impleaded with THOS. S. BLAIR,

Upon the trial of the issue in this cause, the plaintiff, by his counsel, offer in evidence a paper executed April 4th, 1873, at New York, signed Thomas S. Blair, T. Struthers.

Also offered in connection therewith paper dated March 22d, 1875, signed Thomas S. Blair, Thomas Struthers; of which papers the following are copies, to wit:

NEW YORK, *April 4th*, 1873.

Whereas Joseph W. Drexel has purchased four hundred shares of the stock of the Blair Iron and Steel Company, sold by A. S. Diven, trustee of said company, at the price of fifty dollars per share:

Now, we the undersigned, in consideration to us of one dollar, in hand paid, the receipt whereof is hereby acknowledged, do hereby agree that if, at the end of one year from this date, the said Drexel shall desire to sell the said shares at the price paid for the same by him, we will purchase the same at that price, and pay to him the amount paid by him on the same, with interest at the rate
56 of seven per cent. per annum.

April 4th, 1873.

THOS. S. BLAIR,
THOMAS STRUTHERS.

NEW YORK, *March* 22, 1875.

In consideration of the waiver by Joseph W. Drexel of the right of election to sell to us the four hundred shares of stock in the Blair Iron and Steel Company (subscribed and paid for by him), as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4th, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4th, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him, we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent. per annum from the dates of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of Joseph W. Drexel four hundred shares of the stock of the said Blair Iron and Steel Company to be held by him in trust for that purpose.

THOS. S. BLAIR.
THOMAS STRUTHERS.

And prayed the court here that the same might be read and
57 given in evidence to the said jurors; to which the defend-

ants' counsel stated that he did not deny the execution of such papers, but objects to their reception in evidence as irrelevant under the pleadings in the case, the plaintiff having averred that the consideration of the contract was the subscription to four hundred shares of stock in the Blair Iron and Steel Company, the papers which are now offered and which are the contracts set forth that the consideration is the payment of one dollar.

By the COURT: The contracts are admitted subject to consideration hereafter, in view of further evidence which may be adduced.

To which ruling of the court the defendant's counsel did then and there except, and prayed the court to seal this his bill of exceptions, which is done accordingly.

M. W. ACHESON. [SEAL.]

In the further progress of the trial of the issue in the above and foregoing entitled cause the counsel for the plaintiff offered in evidence to the jurors certain exhibits identified by the witnesses, Mr. Marshall and Mr. Drexel, being Exhibits "M," with others; of which Exhibit "M" the following is a copy, to wit:

NEW YORK, *March* 20, 1876.

58 GENTLEMEN: I hereby notify you that I desire to sell the four hundred shares of the stock of the Blair Iron and Steel Company, held by me under the option of sale, according to the terms of the agreement between you and J. P. Morgan and J. W. Drexel, of April 4th, 1873, and the several renewals thereof.

You are hereby notified that I am ready to transfer the stock to you, or to any person or persons whom you may designate, upon the payment of the purchase-money thereof and seven per cent. interest thereon from date of payment.

I hereby tender you the certificate of stock, and I demand fulfilment of your contract on the premises. I am ready and willing at any time to transfer the stock upon the book of the company and fully perform the condition of rescis-ion of purchase.

Respectfully, J. W. DREXEL.

To Mess. Thos. S. Blair and T. Struthers.

And prayed the court that the same might be given in evidence to the said jurors.

To which the defendants' counsel objected as incompetent.

The court overruled the objection and admitted the evidence, to which decision of the court the counsel for the defendants then and there excepted, and prayed the court to seal this his bill of
59 exceptions, which is done accordingly.

M. W. ACHESON. [SEAL.]

In the further progress of the trial of the issue in this cause the defendant's counsel offered to prove by Thomas Struthers, a witness in the case, and by Thos. S. Blair, another witness in the case, that the consideration, one dollar, named in the said agreement was not

paid by Mr. Drexel, or anybody on his behalf, to Mr. Struthers or to Mr. Blair at the time of making it or since, and for that purpose asked the witnesses the following questions:

I wish you to state whether the one-dollar consideration named in said agreement was paid to you at the time of making or since by Mr. Drexel or anybody in his behalf.

To which the counsel for the plaintiff objected as incompetent and irrelevant.

The court sustained the objection and rejected the evidence.

To which decision the defendants' counsel did then and there except, and prayed the court to seal this bill of exceptions, which is done accordingly.

M. W. ACHESON. [SEAL.]

In the further progress of the trial of the issue in the above-entitled cause the court, in the charge to the jury, instructed them to the following effect:

60 Supposing that he (Wallace) did comply with his instructions (in making the demand), then did it become the duty of Mr. Struthers to pay the amount represented by that stock? If it did become his duty to pay that money, then we instruct you that the declaration in this case (what we call the common money counts) is sufficient to enable him to recover. Where parties have made a contract by which certain things to be done on one side and certain things on the other, if one party does all those things that are required to be done by him to entitle him to a sum of money from the other party, he may receive that sum of money under the common money counts. We instruct you, therefore, that so far as the pleadings are concerned, there is no difficulty in the plaintiff recovering under the declaration a verdict for the amount that is due him.

To which instruction of the court the counsel for the defendant did then and there except and pray the court to seal this his bill of exceptions, which is accordingly done.

M. W. ACHESON. [SEAL.]

61 In the further progress of the trial of the issue in the above-entitled cause the court did charge and instruct the jury on the question of usury as follows:

On the face of the papers the question is whether there was any loan at all. There is no usury unless there is a loan of money, and the question is whether the transaction involved a loan or attempted loan of money. We have looked at these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan between the plaintiff and the defendant whereby usury could arise.

It is our duty to give you instructions on that subject, and we say to you that upon that point the defence of the defendant must fail.

To which instruction of the court the counsel for the defendant did then and there except and prayed the court to seal this his bill of exceptions, which is done accordingly.

M. W. ACHESON. [SEAL.]

Indorsed: No. 29. May term, 1882. Joseph W. Drexel *vs.* Thomas Struthers. Bill of exceptions. Filed June 28, 1884.

62 *Assignments of Error.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL
vs.
THOMAS STRUTHERS, Impleaded with THOS. S. BLAIR. } No. 29.

1st. The court below erred in admitting the plaintiff's first offer of evidence, which was as follows, to wit, a paper executed April 4th, 1873, at New York, signed Thomas S. Blair, T. Struthers, and also a paper offered in connection therewith, dated March 22nd, 1875, signed Thomas S. Blair, Thomas Struthers, of which papers the following are copies, to wit:

NEW YORK, *April 4th*, 1873.

Whereas, Joseph W. Drexel has purchased four hundred shares of the stock of the Blair Iron and Steel Company, sold by A. S. Diven, trustee of said company, at the price of fifty dollars per share, now we, the undersigned, in consideration of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, do hereby agree that if at the end of one year from this date the said Drexel shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price and pay to him
63 the amount paid by him on the same, with interest at the rate of seven per cent. per annum.

THOMAS S. BLAIR.
THOMAS STRUTHERS.

NEW YORK, *March 22nd*, 1875.

In consideration of the waiver by Joseph W. Drexel of the right of election to sell to us the four hundred shares of stock in the Blair Iron and Steel Company (subscribed and paid for by him) as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4th, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4th, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent. per annum from the dates of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of Joseph W. Drexel four hundred shares of the stock of

the said Blair Iron and Steel Company to be held by him in trust for that purpose.

THOS. S. BLAIR.
THOMAS STRUTHERS.

64 And the plaintiff prayed the court that the same might be read and given in evidence to the said jurors.

To which the defendant's counsel state that he did not deny the execution of said papers, but objects to their reception in evidence as irrelevant under the pleadings in the case; the plaintiff having averred that the consideration in the contract was the subscription to four hundred shares of stock in the Blair Iron and Steel Company. The papers which are now offered and which are the contracts set forth that the consideration is the payment of one dollar.

And in overruling said objection thereto and in answering the same as follows, to wit:

By the COURT: The contracts are admitted subject to consideration hereafter, in view of further evidence which may be adduced.

To which ruling of the court the defendant's counsel did then and there except, and prayed the court to seal this his bill of exceptions, which is done accordingly.

M. W. ACHESON. [SEAL.]

2nd. The court below erred in admitting the plaintiff's second offer in evidence, which was as follows, to wit, certain exhibits identified by the witnesses, Mr. Marshall and Mr. Drexel, being Exhibit "M" with others, of which Exhibit "M" the following is a copy, to wit:

NEW YORK, *March 20th*, 1876.

65 GENTLEMEN: I hereby notify you that I desire to sell the four hundred shares of the stock of the Blair Iron and Steel Company held by me under the option of sale, according to the terms of the agreement between you and J. P. Morgan and J. W. Drexel, of April 4th, 1873, and the several renewals thereof. You are hereby notified that I am ready to transfer the stock to you or to any person or persons whom you may designate upon the payment of the purchase-money thereof, and seven per cent. interest thereon from dates of payments.

I hereby tender you the certificates of stock, and I demand the fulfilment of your contract on the premises. I am ready and willing at any time to transfer the stock upon the book of the company and fully perform the condition of re-cis-ion of purchase.

Respectfully, J. W. DREXEL.

To Messrs. Thos. S. Blair and T. Struthers.

And the plaintiff prayed the court that the same might be given in evidence to the said jurors.

To which the defendants' counsel objected as incompetent, and in overruling said objection thereto and in admitting the evidence.

To which decision of the court the counsel for the defendants then and there excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

M. W. ACHESON. [SEAL.]

66 3rd. The court below erred in rejecting the defendant's offer of evidence, which was as follows, to wit:

Defendant's counsel offered to prove by Thomas Struthers, a witness in the case, and by Thos. S. Blair, another witness in the case, that the consideration, one dollar, named in the said agreement was not paid by Mr. Drexel, nor by any one in his behalf, to Mr. Struthers nor to Mr. Blair at the time of making it or since; and for that purpose asked the witness the following question:

"I wish you to state whether the one dollar consideration named in said agreement was paid to you at the time of making or since by Mr. Drexel or by any one in his behalf."

To which the counsel for the plaintiff objected as incompetent and irrelevant and in sustaining the objection and rejecting the evidence.

To which decision the defendant's counsel did then and there except and prayed the court to seal this his bill of exceptions, which is done accordingly.

M. W. ACHESON. [SEAL.]

4th. The court below erred in the charge to the jury in in-
67 structing them to the following effect:

Supposing that he (Wallace) did comply with his instructions, then did it become the duty of Mr. Struthers to pay the amount represented by that stock? If it did become his duty to pay that money, then we instruct you that the declaration in this case (what we call the common counts) is sufficient to enable him to recover. Where parties have made a contract by which certain things are to be done on one side and certain things on the other, if one party does all those things that are required to be done by him to entitle him to a sum of money from the other party, he may receive that sum of money under the common money counts. We instruct you, therefore, that so far as the pleadings are concerned there is no difficulty in the plaintiff's recovering under the declaration a verdict for the amount that is due him.

To which instruction of the court the counsel for the defendants did then and there except and prayed the court to seal this his bill of exceptions, which is accordingly done.

M. W. ACHESON. [SEAL.]

5th. The court below erred in instructing the jury as follows, to wit:

68 On the face of the papers the question is whether there was any loan at all. There is no usury unless there is a loan of money, and the question is whether the transaction involved a loan or attempted loan of money.

We have looked at these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan between the plaintiff and the defendants whereby usury

could arise. It is our duty to give you instructions on that subject, and we say to you that upon that point the defense of the defendant must fail.

To which instructions of the court the counsel for the defendant did then and there except and prayed the court to seal this his bill of exceptions, which is accordingly done.

M. W. ACHESON. [SEAL.]

Indorsed: No. 29. May term, 1882. Joseph W. Drexel *vs.* Thomas Struthers. Assignments of error. Filed June 28, 1884. Shiras.

69 *Bond.*

Know all men by these presents that we, Thomas Struthers, Albert D. Wood, and Myron Waters, all of the county of Warren, State of Pennsylvania, are held and firmly bound unto Joseph W. Drexel in the sum of seventy thousand dollars, to be paid to the said Joseph W. Drexel, his certain attorney, his executors, administrators, or assigns; to which payment, well and truly to be made, we, and every of us, do bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals; dated the thirteenth day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the said Thomas Struthers, defendant in a certain suit at law, *at* No. 29, May term, 1882, of the circuit court of the United States for the western district of Pennsylvania, wherein the said Joseph W. Drexel is plaintiff, is about to sue forth a writ of error to the judgment of the said circuit court in the cause aforesaid, in order that the record in the said cause may be removed to the Supreme Court of the United States for inspection:

Now, the condition of this obligation is such that if the above-
bounden Thomas Struthers, plaintiff in error, shall prosecute
70 his said writ of error with effect, and if he fail to make good
his plea shall answer all damages and costs in the premises, then this obligation shall be void; otherwise to be and remain in full force and virtue.

T. STRUTHERS. [SEAL.]
ALBERT D. WOOD. [SEAL.]
MYRON WATERS. [SEAL.]

Sealed and delivered in presence of us.
J. P. JEFFERSON.
CHARLES C. DICKEY.

Taken and acknowledged before me this 13th June, 1884.

S. C. McCANDLESS,
Clerk U. S. Dist. C't, West. Dist. Pa.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Personally before me came Albert D. Wood, one of the above-named sureties, who, being duly sworn, deposes and says that he is worth the sum of forty thousand dollars over and above his debts and liabilities and exemption-.

ALBERT D. WOOD.

Sworn and subscribed this 13th day of June, A. D. 1884.

S. C. McCANDLESS,
Clerk U. S. Dist. C't, West. Dist. Pa.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Personally before me came Myron Waters, one of the above-
71 named sureties, who, being duly sworn, deposes and says that he is worth the amount of the penalty of the above bond over and above his debts and liabilities and exemptions.

MYRON WATERS.

Sworn and subscribed this 13th day of June, A. D. 1884.

S. C. McCANDLESS,
Clk U. S. Dist. C't, W. D. of Pa.

And now, to wit, June 13, 1884, the within bond approved.

M. W. ACHESON,
U. S. Dist. Judge.

Indorsed: No. 29. May term, 1882. Joseph W. Drexel *vs.* Thomas Struthers. Bond of Thomas Struthers, with sureties, in $70,000.00. Filed June 13, 1884.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Joseph W. Drexel, a citizen of the State of New York, and Thomas Struthers, a citizen of the State of Pennsylvania, a manifest error hath happened, to the great damage of the said Thomas Struthers, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of June, A. D. 1884.

[Seal of the U. S. Circuit Court, W. D. Penn'a.]

H. D. GAMBLE, *Clk.*

Allowed by—

M. W. ACHESON,
U. S. Dist. Judge, Presiding in U. S. Circuit Court.

73 [Endorsed:] No. 29. May term, 1882. Joseph W. Drexel *vs.* Thos. S. Blair. Writ of error. Filed June 13, 1884.

74 UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To Joseph W. Drexel, a citizen of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein Thomas Struthers, a citizen of the State of Pennsylvania, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this thirteenth day of June, A. D. 1884.

M. W. ACHESON,
Judge of U. S. District Court, Presiding in the U. S. Circuit Court.

75 [Endorsed:] Citation. Allowed June 13, 1884. July 7, 1884, served on me. John D. O'Gill, att'y for Drexel.

76 In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

JOSEPH W. DREXEL }
vs. } No. 29.
THOMAS STRUTHERS. }

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 16th day of July, A. D. 1884.

[Seal of the U. S. Circuit Court, W. D. Penn'a.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Marcus W. Acheson, judge of the United States district court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, July 16th, 1884.

M. W. ACHESON,
Presiding in the U. S. Circuit Court.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 278. Thomas Struthers, plaintiff in error, *vs.* Joseph W. Drexel. Filed 25 August, 1884.

122, 48 C

Supreme Court of the United States,

OCTOBER TERM, 1886

No. 278.

THOMAS STRUTHERS, Plaintiff in Error,

versus

JOSEPH W. DREXEL.

Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

RASSELAS BROWN,
W. M. LINDSAY,
GEORGE SHIRAS, Jr.
of Counsel for Plaintiff in Error.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 16th day of July, A. D. 1884.

[Seal of the U. S. Circuit Court, W. D. Penn'a.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Marcus W. Acheson, judge of the United States district court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, July 16th, 1884.

M. W. ACHESON,
Presiding in the U. S. Circuit Court.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 278. Thomas Struthers, plaintiff in error, *vs.* Joseph W. Drexel. Filed 25 August, 1884.

122-487

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 278.

THOMAS STRUTHERS, Plaintiff in Error,

versus

JOSEPH W. DREXEL.

Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

RASSELAS BROWN,
W. M. LINDSAY,
GEORGE SHIRAS, Jr.
of Counsel for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 278.

THOMAS STRUTHERS, Plaintiff in Error,

versus

JOSEPH W. DREXEL.

Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

HISTORY OF THE CASE.

Thomas S. Blair and Thomas Struthers, defendants below; were the promoters of the Blair Iron & Steel Company, a Pennsylvania corporation, and the owners of the larger part of its capital stock.

Desiring to supply the company with ready money, with which to conduct its business, Blair and Struthers placed a considerable amount of their stock in the hands of A. S. Diven, in trust, to sell the same and turn over the proceeds to the treasury of the company.

They subsequently signed and delivered a paper, of which the following is a copy.

"*Whereas* Joseph W. Drexel has purchased four hundred shares (400) of the stock of the Blair Iron & Steel Company at the price of fifty dollars per share, and sold by A. S. Diven, trustee of said company; now we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said Joseph W. Drexel shall desire to sell the said shares at the price paid for the same by him, we will purchase the same at that price, and pay to him the amount paid by him on the same, with interest, at the rate of seven per cent. per annum.

THOMAS S. BLAIR,

New York, April 4, 1873. THOMAS STRUTHERS."

Subsequently they executed and delivered another paper, of which the following is a copy.

"NEW YORK, March 22, 1875.

In consideration of the waiver by Joseph W. Drexel of the right of election to sell to us the four hundred (400) shares of stock in the Blair Iron & Steel Company, (subscribed and paid for by him) as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4th, 1875, we do hereby agree that his right to do so shall be extended for another year, viz, to April 4th, 1876. If he shall, at that time, elect to sell to us the four hundred (400) shares so subscribed and held by him, we will receive and pay for the same the amount paid by him therefor, with interest, at the rate of seven per cent. per year, from the date of the payment by him of the respective installments thereon, and as collateral security for the performance by us of this, our agreement, we have placed in the hands of Joseph W. Drexel four hundred shares of the stock of the said Blair Iron & Steel Company, to be held by him in trust for that purpose.

THOMAS S. BLAIR,

THOMAS STRUTHERS."

On the 20th of March, 1876, Drexel gave notice in writing to Blair & Struthers of his desire to exercise the option, and to receive back his purchase money, with interest thereon from date of payment. For copy of this notice see page 6 of the printed record.

Afterwards, in April, 1876, Drexel, through an agent, tendered stock to Struthers, and demanded payment. The terms of that tender and demand, as testified to by the agent, were as follows:

"I went to Warren, Pa. in April of 1876, at the instance of Thomas M. Marshall, to see Mr. Thomas Struthers. I saw him and tendered to him certain stock certificates given me by Mr. Thomas M. Marshall, and demanded the return of the money which these defendants, Thomas S. Blair and Thomas Struthers, had borrowed from the plaintiff, J. W. Drexel." And, again, "I told him what I came for, and presented him his stock certificates, and asked him to return to me the money which the defendants had borrowed from J. W. Drexel." See page 20 of the printed record.

The company having become solvent, and Blair and Struthers having failed to pay the money thus demanded, Drexel brought suit against them in the Circuit Court, for the Western District of Pennsylvania. Blair was not served with process, and the suit was proceeded with against Struthers alone, and resulted in a verdict and judgment against him in the sum of $34,651.36, being the amount of the moneys originally paid by Drexel for the stock, with interest, at the rate of seven per cent. per annum on each installment from the time of its payment.

The questions which arose on the trial, and which we desire to press here were mainly these.

1st. The plaintiff's declaration consisted of a special count

and the common counts. In the special count the plaintiff averred that the consideration for the promise of defendants to take back said stock and repay the money, with interest, if the plaintiff so desired, was that the plaintiff, at the special instance and request of the defendants, would take and pay for, at the rate of fifty dollars per share, four hundred shares of the capital stock of the Blair Iron & Steel Company. But, at the trial, the plaintiff did not offer evidence sustaining that allegation, but offered in evidence the two agreements of April 4th, 1873, and March 22, 1875, wherein it is alleged that the consideration for defendants' undertaking was another and different consideration than that set up in the declaration, namely, the sum of one dollar paid to and received by the defendant.

Defendant's counsel objected to the evidence as irrelevant under the pleadings and variant therefrom; and the action of the court in admitting said evidence is the subject of the first assignment of error.

After the court had admitted, subject to exception, these two agreements, the plaintiff proved the payment by him to A. S. Diven, Trustee of the Blair Iron & Steel Company, for the 400 shares of stock, in several installments and at different times. The plaintiff then offered to show that the consideration that moved defendants to enter into said contract of April 4th, 1873, was plaintiff's undertaking of subscription.

This the defendant's counsel objected to, on the ground that the contract was in writing and the consideration was expressed therein; and that, under the New York Statute of Frauds, the consideration of a contract like that in question must be expressed and must be the one to be shown when made the subject of an offer in evidence in a trial at law.

The learned Judge so ruled, saying, "we hold that the plaintiff cannot state a different consideration from that men-

tioned in the agreement, either under the special or common counts of the declaration."

On the trial the defendants offered to show that the consideration, one dollar, named in the agreements sued on had never been paid. The rejection by the court of this evidence is the subject of the third assignment of error.

The defendant's counsel requested the court to charge the jury:

"That as the evidence does not disclose the receipt of money or any other valuable consideration beyond the nominal sum of one dollar, but merely discloses the breach by the defendant of an express contract for the purchase of stock by the defendant from the plaintiff, such evidence does not sustain the common counts contained in the plaintiff's declaration, and the verdict of the jury should be for the defendant."

"That the mere breach of an unexecuted contract for the purchase of stock in a corporation, the contract itself being in writing, and the consideration named therein being merely a nominal one, does not sustain the common counts in the plaintiff's declaration contained, and the verdict of the jury should be for the defendant."

The refusal of the court so to charge forms the subject of the fourth assignment of error.

Defendant's counsel further requested the court to charge:

"That if the plaintiff, at the instance and request of the defendant, subscribed and paid for capital stock in the Blair Iron and Steel Company, and took a contemporaneous agreement from the defendant that the latter would purchase the said stock from the said plaintiff at the end of one year, if the latter should so desire, and repay him the amount advanced by him, with seven per cent. interest, and if the plaintiff elected to tender said stock and demand a repayment of the money, with seven per cent. interest, then such an arrange-

ment or agreement was an usurious one, and, under the statute of New York in such cases made, void."

"That if the jury find that the arrangement or contract was that the plaintiff would subscribe and pay for the stock if the defendant would agree to purchase it from him if he, the plaintiff, so desired, at the end of a year, and repay the amount advanced, with legal interest; and if they find that he elected to surrender the stock and demand his money, with interest, then such contract would, in point of law, be usurious and void."

The refusal of the court so to charge is complained of in the fifth assignment of error.

NEW YORK STATUTE, 1 R. S. PAGE 725:

SEC. 1. The rate of interest upon the loan or forbearance of any money, goods or things in action shall continue to be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less time, or for a longer or shorter time.

SEC. 2. No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the forbearance of any money, goods or things in action, than is above prescribed.

SEC. 5. All bonds, bills, notes, assurances, conveyances and all other contracts or securities whatsoever, (except bottomry and respondentia bonds and contracts) and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved, or taken or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed, shall be void.

ASSIGNMENTS OF ERROR.

1st. The Court below erred in admitting the plaintiff's first offer of evidence, which was as follows, to-wit: A paper executed April 4th, 1873, at New York, signed Thomas S. Blair, T. Struthers, and also a paper offered in connection therewith, dated March 22d, 1875, signed Thomas S. Blair, Thomas Struthers, of which papers the following are copies, to-wit:

NEW YORK, April 14, 1873.

Whereas, Joseph W. Drexel has purchased four hundred shares of the stock of the Blair Iron and Steel Company, sold by A. S. Diven, Trustee of said company, at the price of fifty dollars per share, now we, the undersigned, in consideration to us in hand paid, the receipt whereof is hereby acknowledged, do hereby agree that if at the end of one year from this date the said Drexel shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price and pay to him the amount paid by him on the same, with interest at the rate of seven per cent. per annum.

THOMAS S. BLAIR.
THOMAS STRUTHERS.

NEW YORK, March 22d, 1875.

In consideration of the waiver by Joseph W. Drexel of the right of election to sell us the four hundred shares of stock in the Blair Iron and Steel Company (subscribed and paid for by him), as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4th, 1875, we do hereby agree that his privilege to do so shall be extended for another year, viz.: to April 4th, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him, he shall re-

ceive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent. per annum from the dates of the payment by him of the respective installments thereon, and as collateral for the performance by us of this our agreement, we have placed in the hands of Joseph W. Drexel four hundred shares of the stock of the said Blair Iron and Steel Company, to be held by him in trust for that purpose.

THOMAS S. BLAIR.
THOMAS STRUTHERS.

And the plaintiff prayed the Court that the same might be read and given in evidence to the said jurors.

To which the defendant's counsel stated that he did not deny the execution of said papers, but objects to their reception in evidence as irrelevant under the pleadings in the case; the plaintiff having averred that the consideration in the contract was the subscription to four hundred shares of stock in the Blair Iron and Steel Company. The papers which are now offered, and which are the contracts, set forth that the consideration is the payment of one dollar.

And in overruling said objection thereto, and in answering the same, to-wit:

By the Court: The contracts are admitted, subject to consideration hereafter, in view of further evidence which may be adduced.

To which ruling of the Court the defendant's counsel did then and there except, and prayed the Court to seal this, his bill of exceptions, which is done accordingly.

[SEAL.] M. W. ACHESON.

2nd. The Court below erred in admitting the plaintiff's second offer in evidence, which was as follows, to-wit: Certain exhibits identified by the witnesses, Mr. Marshall and

Mr. Drexel, being exhibit "M," with others, of which exhibit "M" the following is a copy, to-wit:

NEW YORK, March 20, 1876.

GENTLEMEN: I hereby notify you that I desire to sell the four hundred shares of the stock of the Blair Iron and Steel Company held by me under the option of sale, according to the terms of the agreement between you and J. P. Morgan and J. W. Drexel, of April 4th, 1873, and the several renewals thereof. You are hereby notified that I am ready to transfer the stock to you or any person or persons whom you may designate upon the payment of the purchase money thereof and seven per cent. interest thereon from dates of payments. I hereby tender you the certificates of stock, and I demand the fulfillment of your contract in the premises. I am ready and willing at any time to transfer the stock upon the books of the company and fully perform the condition of re-cis-ion of purchase.

Respectfully,

J. W. DREXEL.

To Messrs. Thomas S. Blair and T. Struthers.

And the plaintiff prayed the Court that the same might be given in evidence to the said jurors.

To which the defendant's counsel objected as irrelevant, and in overruling said objections thereto and in admitting the evidence.

To which decision of the Court the counsel for the defendants then and there excepted and prayed the Court to seal this his bill of exceptions, which is done accordingly.

[SEAL.] M. W. ACHESON.

3d. The Court below erred in rejecting the defendant's offer of evidence, which was as follows, to-wit:

Defendant's counsel offered to prove by Thomas Struthers, a witness in the case, and by Thomas S. Blair, another wit-

ness in the case, that the consideration, one dollar, named in the said agreement was not paid by Mr. Drexel, nor by any one in his behalf, to Mr. Struthers nor to Mr. Blair at the time of making it or since; and for that purpose asked the witness the following question:

"I wish you to state whether the one dollar consideration named in said agreement was paid to you at the time of making or since by Mr. Drexel or by any one in his behalf."

To which the counsel for the plaintiff objected as incompetent and irrelevant.

To which decision the defendant's counsel did then and there except, and prayed the Court to seal this his bill of exceptions, which is done accordingly.

[SEAL.] M. W. ACHESON.

4th. The Court below erred in the charge to the jury in instructing them to the following effect:

Supposing that he (Wallace) did comply with his instructions, then did it become the duty of Mr. Struthers to pay the amount represented by that stock? If it did become his duty to pay that money, then we instruct you that the declaration in this case (what we call the common counts) is sufficient to enable him to recover. Where parties have made a contract by which certain things are to be done on one side and certain things on the other, if one party does all those things that are required to be done by him to entitle him to a sum of money from the other party, he may receive that sum of money under the common money counts. We instruct you, therefore, that so far as the pleadings are concerned there is no difficulty in the plaintiff's recovering under the declaration, a verdict for the amount that is due him.

To which instruction of the Court counsel for the defendants did then and there except and prayed the Court to seal

this his bill of exceptions, which is accordingly done.

[SEAL.] M. W. ACHESON.

5th. The Court below erred in instructing the jury as follows, to-wit:

On the face of the papers the question is whether there was any loan at all. There is no usury unless there is a loan of money, and the question is whether the transaction involved a loan or attempted a loan of money. We have looked at these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan between the plaintiff and the defendants whereby usury could arise. It is our duty to give you instructions on that subject, and we say to you that upon that point the defense of the defendant must fail.

To which instructions of the Court the counsel for the defendant did then and there except and prayed the court to seal this his bill of exceptions, which is accordingly done.

[SEAL.] M. W. ACHESON.

BRIEF OF ARGUMENT.

1st. The plaintiff's declaration, in its special count, alleged that the consideration of defendant's agreement sued on was the undertaking of plaintiff to subscribe and pay for four hundred shares of stock. The agreement, when produced and offered, showed that the consideration of defendant's assumption was one dollar to him paid.

The defendant's counsel objected to the offer as constituting a variance between the allegation and the proof, and in overruling this objection we now contend that the learned judge erred. The rule as laid down in Greenleaf on Evidence, 1

vol. Redfield's Edition, sec. 66, is: "If any part of the contract proved vary materially from that stated in the pleadings, it will be fatal, for a contract is an entire thing and indivisible." And is similarly expressed in Chitty, 16th American Edition, 1 vol. pages 270 to 273.

And again: "A further observation may be made, applicable to every action founded on a written document, viz: that the first step in the evidence on the side of the plaintiff is the production of the document itself. If there is any variance between it and the description contained in the declaration it will be rejected." 2 Greenleaf, sec. 11.

"The bill or note produced must conform in all respects to the instrument described in the declaration, for every part of a written contract is material to its identity, and a variance herein will be fatal. 2 Greenleaf, sec. 160.

The learned judge, in overruling the objection, observed that the contracts were admitted subject to consideration hereafter, in view of further evidence which may be adduced, and, as is evident in the subsequent course of the trial, he had in view evidence subsequently adduced showing tender of the stock and demand of payment. Such evidence the learned judge ruled as admissible to sustain the common counts.

But was the learned judge correct in this ruling?

The variance being a plain one, ought not the plaintiff to have been driven to an amendment or been non-suited? However that may be, we are now brought to consider the correctness of the learned judge's ruling that the plaintiff might recover under the common counts, and which forms the subject of the fourth assignment.

"The law *presumes* a promise only where it does not appear that there is any special agreement between the parties. For,

if there is a *special contract* still open and unrescinded, embracing the same subject matter with the common counts, the plaintiff, if he should fail to prove his case under the special count, will not be permitted to recover on the common counts. Thus, where the plaintiff paid seventy guineas for a span of horses, the defendant agreeing to take them back if the plaintiff should disapprove them, and he being dissatisfied offered to return them, and defendant refused to receive them back, it was held that the plaintiff could not recover under the common counts, it appearing that the agreement was in writing."

2d Greenleaf, sec. 101 and 103.

"While it is true that, in some cases, a party who has failed to sustain the special count, may recover under the common counts, *yet this is only where he might have recovered without the special count being in the declaration*, and only where, supposing there had been no special contract, he might have recovered for money paid or work or labor done."

1 Chitty on Pleadings, 16th American Edition, p. 350.

"Where damages are claimed for the breach of a special contract, the declaration must of course count upon the contract."

Royalton vs. R. & W. Turnpike Co. 14 Vermont 311.

Mann vs. Locke, 11 N. H. 246.

The view of the learned judge was that, while the rule was as stated, yet if the contract was an executed one, and when the plaintiff had done all that he was by the contract required to do, he might recover under the common counts, and he so regarded the position of the plaintiff in the present case, and so instructed the jury. In this we humbly conceive the learned judge fell into error.

A contract of the kind in evidence could not be regarded as an executed one, merely because the plaintiff had elected to return the stock and had demanded his money of the defend-

ant. Even if the stock certificates in question, with blank powers of attorney, can be regarded as chattels, and as the subject of a valid tender, still, in our case, the defendant's agreement was not to pay what the stock was really worth, but, by virtue of the said contract in writing, to repay certain installments previously paid by plaintiff, with interest, at the rate of seven per cent. per annum. Hence such a case would not comply with the rule as stated by Chitty, above cited, and as laid down by the authorities.

If the contract had been to buy the shares merely, the plaintiff might have been entitled to prove, as his damages, what was the difference between the actual or market value, and the price which the defendant had agreed to pay. But here the defendant's agreement was to repay a particular sum of money with interest, not from the date of the breach but from the times when the plaintiff had originally paid the installments, and this, we submit, clearly distinguishes this case from those relied on to sustain the ruling below.

Thus it was held, in *Ordway vs. Calcord*, 14 Allen, 59, that in an an action for money had and received, the plaintiff can only recover interest from the date of the writ, unless in his declaration he has stated a prior demand.

It is to be observed that, in our case, the plaintiff was permitted to recover, not the actual or market value of the stock, nor yet interest from the date of the breach, or from the date of the writ, but the sums originally paid at different times by the plaintiff, with interest from the dates of such payments. Thus clearly showing, as we think, that the theory of recovery under the common counts was not applicable to this case.

Nor can it be successfully contended that the present case can be ranged under the head of *rescinded* contracts, where, in some cases, it has been held that a recovery may be had under common counts. The plaintiff could not rescind this

contract, or treat it as rescinded, because he had received and kept advantages under it, that is he had enjoyed the ownership of the stock during the period that the option ran, with the opportunity thus given of receiving dividends, if any had been earned.

But the plaintiff's case failed in another particular to come within the case of an executed contract, because the plaintiff had not performed the consideration by paying the amount thereof to the plaintiffs. It is the sum of all the authorities that if the plaintiff has not performed his part of a contract in writing, he cannot recover the contract price, or enforce the contract as such, though he may, in some cases, recover under a *quantum meruit*, or under a count for money had and received.

Indeed, the learned judge himself so laid down the law in this case, by telling the jury that the plaintiff could only recover under the common counts if he had done all that he had to do.

But the defendant had pleaded and had offered to show in the course of the trial, that the plaintiff had not paid the consideration named in the contract, and this the learned judge had refused to permit him to do. This we complain of in our third assignment. The learned judge had, in sustaining defendant's objection, refused to permit the plaintiff to show another consideration than the one named in the agreement, and he seems to have thought that the defendant, by raising and insisting upon that objection, had precluded himself from showing that the consideration named in the agreement had not been, in point of fact, paid.

Why this should be so we are not able to perceive. That, under the general rules of law and the statute of fraud of the State of New York, the plaintiff was restricted to relying upon the consideration stated in the contract, might well be

claimed by the defendant, and that he rightfully so claimed was held by the learned judge. But while the defendant thus put himself in the place of asserting that the consideration agreed upon was the one named in the contract, surely that would not prevent him from showing that it had never been paid or performed. To contend that a given contract has a certain import is surely not inconsistent with an offer to show that it has not been executed or complied with. That defendant rightfully objected to the plaintiff's offer to go outside of the written contract would seem to be no reason why it must be conclusively presumed that the plaintiff performed his contract. It is not deemed necessary to cite cases going to show that a receipt or acknowledgment of payment, though in writing, can always be contradicted by extrinsic proof.

If, then, the learned judge erred in excluding this evidence, it will follow also that he erred in instructing the jury that the plaintiff could recover under the common counts. With this evidence, if believed by the jury, it would then have appeared that the plaintiff had not performed his part of the agreement, and that it, therefore, could not be regarded as an executed one on his part.

But if the learned judge must be regarded as having rightfully excluded our evidence, and as having rightfully held that the contract in suit can be deemed an executed contract for the repayment of a certain sum of money by the defendant, with interest from the time of the original payments by the plaintiff, then, it seems to us, that he erred in his treatment of our defense that the contract was an usurious one and void.

If the contract imported what the learned judge held it to import, in order to enable the plaintiff to recover under the common counts, namely, an agreement on demand to repay certain sums of money with legal interest from payment, then

as the plaintiff's evidence showed that in addition to the right to get his money back with legal interest, the plaintiff enjoyed, by virtue of the contract, the further and additional advantage of holding the stock during the period of the option, the opportunity of receiving dividends thereon, and the right finally to retain the stock, then, under the authorities, the case was clearly one of an usurious contract.

"When a lender stipulates for a contingent benefit beyond the legal rate of interest, and has the right to demand the repayment of the principal sum, with the legal interest thereon, in any event, the contract is in violation of the statute prohibiting usury and is void."

Brown vs. Vredenburgh, 43 N. Y., 195.

"Any stipulation for a chance of advantage beyond legal interest is usurious."

Thomas vs. Murray, 34 Barb., 157.

And it is obvious on the face of the contracts depended on by the plaintiff in this case, that he did have a stipulation for a chance of an advantage beyond lawful interest. If dividends in excess of 7 per cent. were earned, or if the market value of the stock advanced beyond the sum advanced by the plaintiff, then he could elect to take the dividends or the stock. If not, he had an agreement for the return of his principal with legal interest. Under the arrangement, the plaintiff might receive more than legal interest, but could not possibly receive less. He did not hazard his principal but only the interest, and these are well-known characteristics of usurious contracts.

"Where a span of horses and other chattels are conveyed upon an agreement that the owner may repurchase the same within six months, upon paying the amount advanced with

interest for the use thereof, it was held that the contract was usurious upon the face of it."

Starkweather vs. Prince, 1 MacArthur, 144.

On the face of the paper signed by Blair and Struthers taken *alone*, we think a loan and usurous intent is manifest. But, taking the testimony adduced by plaintiff, for true, and giving it a fair construction, whilst it furnishes the *only* proof in the case, of an undertaking by defendants to refund to the plaintiff, moneys he might or did pay to the Blair Iron & Steel Co., for stock, it clears away the doubts arising from the use of the language of purchase and sale in that side of the agreement signed by Blair and Struthers, and characterizes the agreement between the parties more fully as for a loan—and usurious, leaving no escape from that conclusion. He testifies as a witness himself, that he was indisposed to go into the thing (the subscription), until this agreement of Blair and Struthers was brought to him. He reads in evidence the deposition of J. S. Wallace, who says he was sent by his (Drexel's) attorney, Marshall, to tender stock of the Blair Iron & Steel Co., and demand of Struthers the money *borrowed* by these defendants, Blair and Struthers, of Joseph W. Drexel, the plaintiff. He calls it money *borrowed* three times in his answers. This the plaintiff proves by his own instructed agent. How, then, can he contend that there was no *intention* of a loan when the contract was made, in the face of his own proof that he so understood it? To say the least, it was a fact which ought to have gone to the jury upon the evidence. But the judge, casting aside all the evidence except the paper signed by Blair and Struthers, decides the point, both of law and fact, on a construction of that paper alone. He says: "On that subject (usury) we are *obliged* to speak from the face of the paper *alone* (there was but *one* paper—that signed by Blair and Struthers—before him).

We have nothing else to go upon. On the face of the papers (paper), the question is whether there was any loan at all. There is no usury unless there is a loan of money, and the question is whether there is a loan of money or an attempted loan of money. We have looked over these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan money between the plaintiff and defendant, whereby usury could arise."

Here the judge is mistaken in saying there was no evidence but the papers (paper) to go upon. The deposition of Wallace was before him, as the judge's charge shows. And that it made against the party who produced it, was no good reason for overlooking it. It should have gone to the jury, with the paper, to find the fact.

But if the paper on its face does not import a loan, it is hard to tell what it does mean. It is not a contract for the sale and delivery of stock at the end of a year.

The right *not* to deliver it at the option of Drexel is expressly reserved. That if it should appreciate in market value, so that he could realize more than the money advanced on it, and 7 per cent. interest, either by holding it and receiving dividends, or by sale, Blair and Struthers would not get it without paying more, or a new bargain, would hardly be denied. And to suppose that Blair and Struthers would agree to purchase said stock a year in advance of the time of delivery, at the price he advanced on it, with interest, subject to the risk of depreciation, and with no chance of advantage from an appreciation in value, would involve an absurdity sufficient to impeach their sanity, and render the contract void by reason of the incapacity of one of the parties to contract.

But, construing the contract as for a loan, as the plaintiff conclusively determines it by his election and claim for the

money, suing for it, the case is brought within the range of not infrequent business transactions. It is not unusual for persons or parties having undertaken enterprises, in the completion of which they anticipate great gain, to find the cost of construction greater than their first estimates, their funds fall short and they must borrow money, even at excessive rates, or lose what they have invested, as well as the profits they expected to realize from the business. Whilst, therefore, the theory of bargain and sale is inconsistent and absurd, that of agreement for a loan, even for extra interest, is supported both by reason and business usage. Many like cases have come into the courts and been adjudicated, and though infinite schemes and devices have been resorted to, in shaping papers to avoid the penalities for taking excessive interest or premium for the use of money loaned, they have not been allowed to prosper, the courts always seeking for the actual and true meaning and intent of the parties in such contracts.

The price at which Drexel purchased (or subscribed for) shares of stock of the Blair Iron & Steel Company was $50 per share, as appears by the agreement and certificates, or fifty per cent. of its par value, and, at that price, he paid to said company, through Diven, trustee, who "*collected the subscriptions* on the stock *subscribed for*"—and received certificates of stock for the same. Could he have paid on subscription, had he not subscribed? The money went into the treasury of the company, the witness, Smith, being treasurer, as he testifies. Drexel declined to subscribe until this agreement of Blair and Struthers was brought to him, as he testifies; and he sets forth in his declaration that he subscribed for the same in consideration of this agreement of Blair and Struthers of April, 1873. He thus, as before mentioned, connects his subscription and the agreement of Blair and Struthers as mutual considerations, and identifies them as constituting one contract,

and that upon that contract he advanced the money that paid for the stock. The contract recites that he had *purchased* 400 shares; but the evidence fairly construed shows that that meant *subscribed for*. The certificates issued to him on the subscription and payment to the company. It recites too, that Blair and Struthers agreed to *purchase* of him (Drexel). But plaintiff's assumption and proofs are to the effect that he advanced the money for the stock on defendant's account. His only right to receive and hold the certificates was therefore as collateral security for their obligation. He never owned them. A purchase of their own stock by Blair and Struthers could not have been meant. The most that could be said under the terms and fair construction of the agreement is that, at the end of a year he might deliver up to them their agreement or obligation, and thus become the owner of the shares under his right of option. He would then be in condition to offer them for sale; and to name his price, and not until then. He elected *not* to become the owner by not giving up the obligation, and thus confirms the construction that a security for money loaned and advanced was the true meaning and intent of the parties. This is on his own theory and evidence.

To *purchase* at price given by him and interest, and to pay back or refund the same amount advanced, with interest, are expressions which convey substantially the same meaning; the language of bargain and sale being evidently used to render less conspicuous the purpose of the option reserved to the plaintiff in the contract. If, on the face of the paper, any doubt should exist as to a loan being the understanding of the plaintiff in making this agreement, it is dissipated by the testimony of his witness, Wallace; who, sent with instructions, says he tendered this stock to Struthers and demanded the

money borrowed by these defendants, Blair and Struthers, from J. W. Drexel, the plaintiff.

That he was after borrowed money he states three times in his answers, deliberately made to interrogatories put by the plaintiff's attorney, on commission. Here is plaintiff's own construction of the contract, given in alleged instructions to his agent—which instructions, it would seem, especially required him to keep Struthers in mind that it was for borrowed money. This testimony of Wallace was not alluded to in the charge of the Court—except casually in reading the deposition. Its importance should have been impressed on them.

The Court says to the jury: "You will bear in mind the fact that Wallace went there with these papers and a duty to perform; he was under *instructions*, you are to infer from his testimony and that of Mr. Struthers, whether he complied with his instructions or not."

Struthers was no witness to his instructions and there is no evidence that he saw or heard them. The only evidence of Wallace himself, and from his testimony alone can inferences on the subject be made. Besides, the issue was not on his instructions, but on what he did in the way of tender and demand. In the charge his Honor dwells on other portions of Wallace's testimony, but avoided all notice of the legal effect or proper inferences to be drawn from the word "borrowed" so often used in it.

The jury would, in a common sense way, say: Where the one borrows, the other lends—the result being a loan by one to the other—Yet they would be slow to say, that, in summing up the case to them, the judge had left out or misconstrued material parts of the testimony; or dispute the correctness of his opinion on facts.

In *White et al. vs. Wright*, 10 Eng. C. L., 75, it is decided that where the lender of stock reserved to himself the divi-

dends by way of interest, and the option of deciding at a future day whether he would have the stock replaced or the sum produced by the sale of it repaid to him in money, with 5 per cent. interest, the bargain is usurious—and that it made no difference whether the *whole* of the agreement was contained in one instrument, or whether the lender procured the execution of two instruments by one of which he might compel the replacing of the stock, by the other the repayment of the money and interest. In this case Abbott, C. J., refers approvingly to *Bernard vs. Young*, 17 Ves., 44, in which the Master of the Rolls, in giving judgment, says: "The lender is, at his *election*, to have his principal and interest or to have a given quantity of stock transferred to him. His principal was never in any hazard, as he was sure of having that with legal interest, and had the *chance* of an advantage if stock rose. It was usurious to stipulate for that chance." The contract was declared void and a non-suit awarded.

Bayley, J., and Holyrood, J., concurred with the Chief Justice.

In *Litchfield vs. Irwin*, 51 N. Y., p. 51, plaintiff transferred to defendants by receipted bill of sale certain R. R. bonds, and with it a guarantee that if certain conditions were not fulfilled within one year, the money, with interest, should be refunded upon return of the bonds. The conditions were not performed within the year, and under certain negotiations the matter ran along for some time, when suddenly the bonds rose in value, and the plaintiffs tendered the money paid for them and demanded their return, which the defendant refused. Held, that the plaintiff held no option to demand their return upon tendering the money, but that the *option* was with *defendant* to determine whether the transaction should be an *absolute sale* or loan. (Similar to the case in hearing with the parties holding the option reversed.) Earl, C. J., in his opinion in this

case, cites, amongst others, the case of *Enos vs. Woodward*, 4 Conn., 249: "A. agreed to sell to B. certain lands and convey the same to him on a day named, and B. paid down the purchase money. A. also agreed that at the expiration of a year, if B. should desire it, he would pay back the money with interest. The court held that this was in effect an alternative agreement, either to sell and purchase land, or to lend and borrow money, as B. might elect at the end of the year. B. had the option to retain the property conveyed or to turn the transaction *absolutely into a loan of money.*

In *Boynton vs. Woodbury*, 101 Mass. 346—A. agreed in writing, that whereas B. had bought of him 20 shares of stock for a certain sum, he, in consideration thereof, would purchase back said shares, if B. so elected, in one year from date, and, upon the written request of B. and reassignment of said shares, would pay the said sum and interest. It was held that it was B.'s option whether to hold the shares as purchased, or merely as collateral security for the loan of the sum loaned by him. And the Judge, after having examined the authorities extensively, decides that "the contract fairly construed gives them (the defendants there as the plaintiffs here) the option to determine whether the transaction shall take the form of a loan of money—they holding the bonds simply as security, or whether it should stand as an absolute sale of bonds."

In *Quackenbos vs. Sayre*, 62 N. Y. 344, it is decided that a sale of railroad bonds on time, at more than their market value to enable the vendee to borrow money upon them, not a *bona fide* sale, but a usurious loan. Allen, J., says the transaction must be judged by its real character rather than by the form and color the parties have seen fit to give it. The shifts and devices of usurers to evade the statute against usury have taken every shape and form that the wit of man

could devise, but none have been allowed to prevail. Courts have been astute in getting at the true intent of the parties, and giving effect to the statute, &c.

In *Bronn et al. vs. Vredenburgh's Admr.*, 43 N. Y., p. 196, it is decided that "when a lender stipulates for a contingent benefit beyond the legal rate of interest, and has the right in any event to demand the repayment of the principal with legal interest thereon, the contract is in violation of the statute prohibiting usury, and is void."

Allen, J., in the course of his opinion in this case, remarks, p. 199: that "the usurious compensation being reserved by the plaintiff by the unequivocal terms of the contract, the parties could not be relieved from the legal consequences of the agreement by anything that transpired during the negotiations."

RASSELAS BROWN,
W. M. LINDSEY,
GEORGE SHIRAS, JR.,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 278 October Term, 1886.

Thomas Struthers, Plaintiff in Error,

versus

Joseph W. Drexel, Defendant in Error.

Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

Brief on Behalf of Defendant in Error.

JOHN DALZELL,
Attorney for Defendant in Error.

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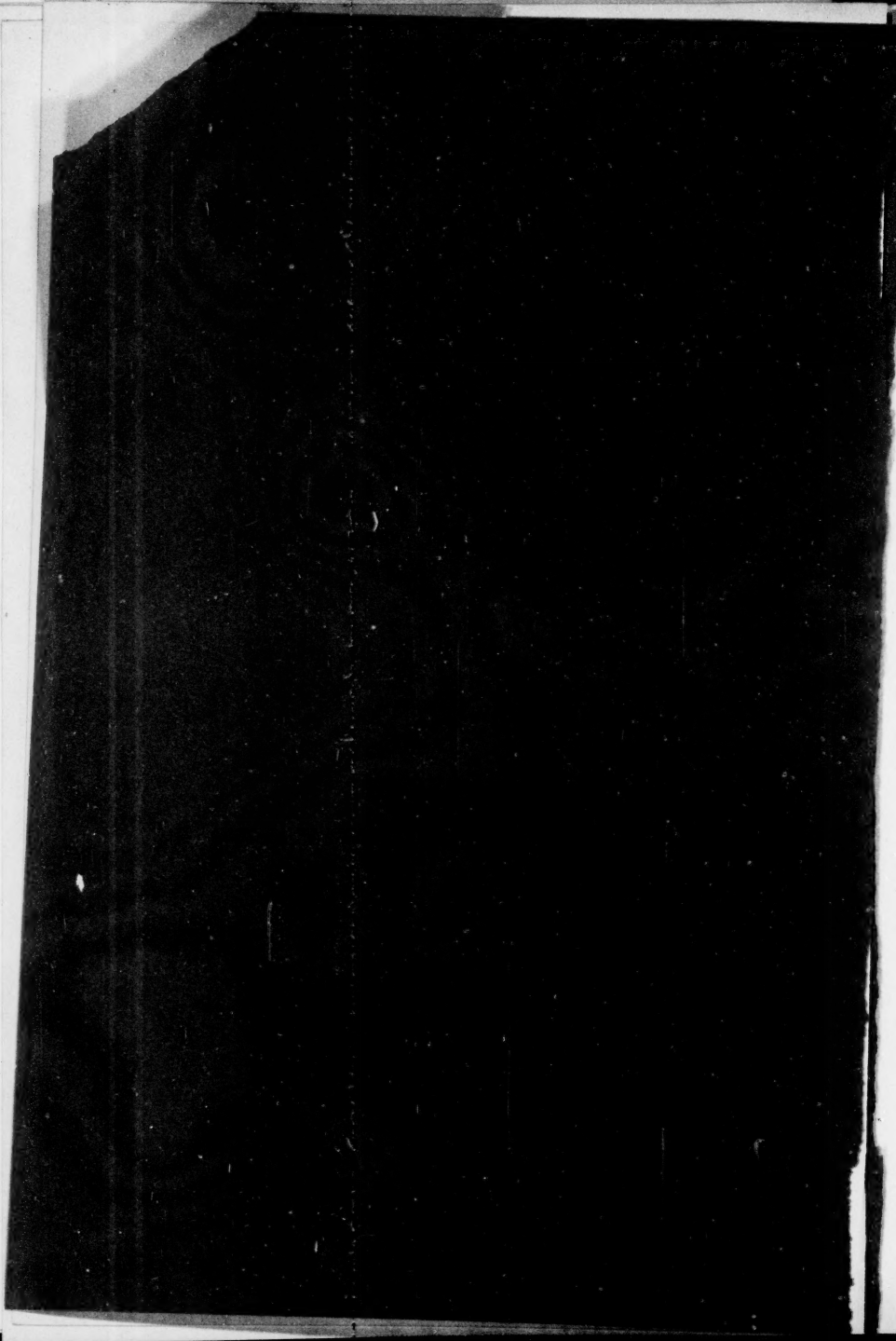

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ARGUMENT.

The first assignment of error raises a question which is purely technical. It was contended in the Court below that the testimony offered by plaintiff was not admissable, because the consideration named in the first count of his declaration was something other than one dollar, while the consideration named in the paper offered was simply one dollar.

In point of fact, the paper offered showed, as his Honor in the Court below declared, probably other considerations than the one dollar named. Nevertheless, the contention of the defendant as to this matter was sustained, but the evidence was admitted under what was called the "common counts." The question now is, whether such admission was error.

The testimony offered and admitted was as follows:

First. A paper dated New York, April 14, 1873: "Whereas, Joseph W. Drexel has purchased 400 shares of the stock of the Blair Iron and Steel Company, held by A. S. Diven, *Trustee of said Company*, at the price of $50 per share, now we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if, at the end of one year from this date, said Drexel shall desire to sell the said shares at the price paid for the same by him, we will purchase the same at that price, and pay him the amount paid by him on the same, with interest at the rate of seven per centum per annum.

"THOMAS S. BLAIR.
"THOMAS STRUTHERS."

Second. Paper dated New York, March 27, 1875: "In consideration of the waiver by Joseph W. Drexel of the right of election to sell to us the 400 shares of stock in the Blair Iron and Steel Co. (subscribed *and paid for* by him), as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4, 1876. If he shall at that time elect to sell to us the 400 shares so subscribed and held by him, we will receive and pay for the same the amount paid by him therefor, with interest at

the rate of 7 per centum per year from the date of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this, our agreement, we have placed in the hands of Joseph W. Drexel 400 shares of the stock of the said Blair Iron and Steel Company, to be held by him in trust for that purpose.

"THOMAS S. BLAIR.
"THOMAS STRUTHERS."

Third. A certain paper dated New York March 20, 1876. "Gentlemen: I hereby notify you that I desire to sell the 400 shares of the Blair Iron and Steel Company held by me under the option of sale according to the terms of the agreement between you and J. P. Morgan and J. W. Drexel, of April 4, 1873, and the several renewals thereof. You are hereby notified that I am ready to transfer the stock to you or any person or persons whom you may designate, upon the payment of the purchase money thereof and 7 per cent. interest thereon from the date of payment. I hereby tender you the certificates of stock, and I demand fulfillment of your contract in the premises. I am ready and willing at any time to transfer the stock upon the books of the Company and fully perform the conditions of rescision of purchase.

"Respectfully,
"JOSEPH W. DREXEL.
"*To Messrs. Thomas S. Blair and T. Struthers.*"

Fourth. Evidence that upon the 4th day of April 1876, the plaintiff tendered to the defendant Struthers certificates for 400 shares of the capital stock of the Blair Iron and Steel Company, having endorsed thereon a power of Attorney in blank authorizing the transfer of said shares, duly executed by the plaintiff, and that the plaintiff also, at the same time, tendered a return to defendant Struthers of

the stock held by him as collateral for the performance of the contract in evidence.

Fifth. Evidence of refusal upon the part of the defendant to take the stock and pay therefor.

Under the testimony thus offered, the duty imposed on the plaintiff, in case he wished to sell certain stock, was to deliver the same to the defendant on a certain day. The defendant's duty was to receive, take and pay for the stock at a price agreed upon by the parties and definitely named in the contract—to-wit: for 400 shares of stock, fifty dollars per share with interest at the rate of seven per centum (legal interest in New York) from April 4, 1873; or, according to the supplemental agreement, with interest from the dates when the plaintiff had paid therefor in instalments.

The plaintiff's duty was well defined; so was the defendant's.

The testimony shewed that on the day named, the plaintiff tendered the stock to the defendant and demanded the price agreed upon. The plaintiff had then done all that his contract required him to do, *and so the jury found.* All that the defendant had to do, was to take and pay for the the stock at the agreed price—and this he refused to do. Such being the situation of the case, his Honor in the Court below said: (p. 22 Record) "When parties have made a contract by which certain things are to be done on one side, and certain things on the other, if one party does all those things that are required to be done by him to entitle him to a sum of money from the other party, he may recover that sum under the common money counts."

This was nothing more than an application of a very simple and well recognized rule of pleading as laid down in the text books and sustained by decisions too numerous to cite.

"It is a familiar rule of pleading that when the terms of a special contract have been so far performed that nothing remains but a mere debt or duty to pay money, then the amount may be recovered on a general count. It is only necessary to declare specially where the agreement remains executory; thus, when the contract of sale is complete and the vendor does not take away the goods purchased, the vendor may recover the price in *indebitatus assumpsit*."
1 Chitty Pl. 350 (16 Am. Ed.)

"So if the defendant prevents the plaintiff from filling a special contract, or the plaintiff is prevented by unavoidable accident, or if the defendant incapacitates himself from fulfilling the special contract on the subject." *Idem.*

"When the contract has been performed by the plaintiff and the duty is imposed on the defendant to pay the amount due in money, a recovery may be had on the general count though there was a special count * * * * * And a note payable in specific articles is admissable in evidence under a common count."
Aims vs. Le Rue, 2 McLean 216.

In Bank of Columbia vs. Patterson's Administrator, 7. Cranch 299, Story, Justice, says: (p. 303) "We take it to be uncontrovertably settled that *indebitatus assumpsit* will lie to recover a stipulated price due on a special contract not under seal, when the contract has been completely executed, and that it is not in such cases necessary to declare upon the special agreement."

In the case of Chesapeake and Ohio Canal Company vs. Knap, 9 Peters 564, *et. seq*, there is a complete discussion of the law on this subject by Mr. Justice McLean. He says, "in 1 Bacons Abr. 380, it is laid down that whenever the consideration on the part of the plaintiff is executed, and the thing to be done on the defendant's part is the mere payment of a sum of money due immediately, or

where money is paid on a contract which is rescinded so that the defendant has no right to retain it, this constitutes a debt for which the plaintiff may declare in the general count on an *indebitatus assumpsit*. Anciently the count in such case was special, stating the consideration as executory, the promise, plaintiff's performance and the defendant's breach, but *indebitatus assumpsit*, has grown by degrees into use. * * * * * By the instructions of the Court the Jury must have found the contract executed by the plaintiffs below, before they rendered a verdict in their favor. We think the question has been settled by the adjudged cases above cited, and that on this point there is no error in the instruction of the Court."

So in the case at bar, the Jury found that the contract had been performed by the plaintiff, this question having been expressly submitted to them.

In Moulton vs. Trask, 9 Metcalf 580, C. J. Shaw says: "When a contract is at an end, either by its own original terms, or by the subsequent consent of the parties, or by the unjustifiable act of the defendant, and nothing remains but to pay money, *indebitatus assumpsit* will lie, although the debt accrued under a special contract, and said special contract may be proper and necessary evidence in support of the action."

In Henchley vs. Henderson, 5. McLean 170, it was held that where there had been a sale of hogs to defendant and he had given notes in payment therefor, and suit was brought on the notes on a common count, and there was a misdescription of the notes in the declaration, so that they were excluded, the plaintiff could recover on the common counts.

That this is the law in Pennsylvania, is well settled: "Where the terms of a special agreement have been performed and nothing remains but the mere duty of the

defendant to pay money, the plaintiff may recover under the common counts."

Bomeisler vs. Dobson, 5 Wharton 398.

Brown vs. Foster, 51 Penn'a 165.

The case presented in the Court below falls strictly within the rule laid down in 1 Chitty on Pleading, (16th, Am. Ed. p. 350) cited by counsel for plaintiff in error. It was a case where the plaintiff might have recovered without the special count being in the declaration.

Royalton vs. R. and W. Tp'ke Co., 14 Vt. 311, and Mann vs. Locke, 11 N. H., 246, cited by plaintiff's counsel, are both cases of *tort*, and can have no bearing on the question at issue.

It is possible that if the case had been presented in the Court below as counsel for plaintiff below attempted to present it, there might have been room for the argument now made by counsel for plaintiff in error. But in objecting to the evidence offered relating to a consideration beyond the one dollar named in the paper in evidence, counsel clearly overreached themselves. They now seek to argue the case as if that evidence had been admitted.

For instance: they say (p. 13 of Brief), "a contract of the kind in evidence could not be regarded as an executed one, merely because the plaintiff had elected to *return* the stock, and had demanded his money of the defendant * * * the defendant's agreement was not to pay what the stock was really worth, but, by virtue of the said contract in writing, to *repay* certain instalments previously paid by plaintiff, with interest at the rate of seven per centum."

There is not a word of testimony in the case looking to *a return of stock*, nor to *a repayment of instalments*, &c.

The testimony simply shows *a sale of stock* by plaintiff at his option to defendant, *at a fixed and determined price*.

The statement upon page 14 of the Brief for plaintiff in error: "But here defendant's agreement was to *repay* a particular sum of money, with interest, not from the date of the breach, but from the times when the plaintiff had originally paid instalments," is utterly without foundation in fact. The absolute and unequivocal agreement was, that if on April 4, 1876, the plaintiff elected to sell 400 shares of the capital stock of the Blair Iron and Steel Company, subscribed and paid for by him, the defendant would take the same and pay therefor the amount paid by plaintiff, with interest thereon at the rate of seven per centum. It is impossible to torture out of the contract in evidence, or any testimony in the case, an agreement to *repay* money. There was no question of actual or market value, or of damages, involved in the case. It was in evidence, and is now admitted, that at the time of the tender of the stock, the Blair Iron and Steel Company was insolvent. The defendant's agreement was an absolute agreement to pay for the stock at a fixed price, which had been determined upon by the parties when the agreement was originally made.

Second assignment of error: No argument is pretended to be made against the correctness of the admission by the Court below of the written notice of the plaintiff to defendant of the former's intention to exercise the option to sell.

Third assignment of error: Who ever heard of a party being permitted, in a court of justice, to destroy his contract by denying his receipt of the consideration named therein, in the absence of any allegation of fraud, accident or mistake?

In Redfield vs. Haight, 27 Conn. 31, it is well said: "The parties to a good and valid contract having agreed to insert as consideration a specific sum of money, whether

one dollar or one hundred dollars, ought not, in an action on the contract, to be allowed to deny the form or validity of such consideration as is thus expressed. For it was made to assume that form in order to bind the parties effectually, and after this it would be equally unjust and unprecedented to allow them to deny or rescind the agreement, without mutual consent."

And so again in Lawrence vs. McCallmot, 2 Howard 452, Story, Justice, says: "The guarantor acknowledged the receipt of one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it."

A like proposition is affirmed in Davis vs. Wells, 14 Otto 167.

Fourth assignment of error: This is substantially the same as the first, and requires no further discussion.

The fifth assignment of error is to the instruction given by the Court to the jury, as follows: "On the face of the paper the question is, whether there was any loan at all. There is no usury unless there is a loan of money, and the question is, whether the transaction involved a loan or attempted loan of money. We have looked at these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan between the plaintiffs and defendants, whereby usury could arise."

The opening sentence of the argument of counsel in support of this assignment of error is: "If the contract imported what the learned Judge held it to import in order to enable the plaintiff to recover under the common counts —viz., *an agreement on demand to repay certain sums of money, with legal interest from the payment, then*," &c.

The whole argument to sustain this assignment of error

is founded upon the assumption, that the Court below held the agreement in evidence to be "an agreement or demand to repay certain sums of money, with legal interest from the payment." And yet it is perfectly apparent, from the language of the Court assigned as error, that the Court below held no such thing, but exactly the opposite. Here, as elsewhere, counsel have fallen into the error of arguing this case as if the testimony offered by the plaintiff and objected to by the defendant had been admitted by the Court, instead of having been rejected by it, as in point of fact it was. The premise upon which the argument is based being incorrect, the argument must necessarily fail.

But aside from this, there are many and potent reasons why the Court below was right in saying that the question of usury did not rise at all upon the case as presented.

I. There was no evidence in the case which would have justified the jury in finding that the contract between the parties imported a loan of money. Upon the face of the paper the contract was one of sale. The defendant expressly agreed, upon the happening of a certain contingency, to take and pay for the stock that had been purchased by the plaintiff, at a given and predetermined figure.

There was no testimony in the case which could reasonably give rise to the inference that the contract was other than what it appeared to be on its face, and certainly none which would have justified the jury in finding that the contract was of loan and not of sale. Two things are suggested by counsel for plaintiff in error as going to show that the transaction contemplated a loan. One was, that the plaintiff testified that he was indisposed to invest in the stock of the Blair Iron and Steel Company until the agreement of the defendants was submitted to him. And the other was that the law student of Mr. Marshall, who acted

for the plaintiff in making tender of the stock, used in connection with his demand, words which imported that the money asked for had been loaned. But surely no court would have been justified in permitting the jury to find, nor would any jury have been justified in finding, because of either of these things, that the written contract between the parties was other than what it seemed to be. It is not an unusual thing in business transactions for one party to induce another to engage in a business venture upon the representation that if, upon after-consideration, he should become dissatisfied therewith, it would be taken out of his hands without loss to him. Nor could any mistaken or inaccurate use of terms by the law student who made the demand, change or give character to the transaction, which was already complete. So that it would seem that his Honor in the Court below was fully justified in saying, that "there is no evidence on their [the papers'], face that there was any intention to loan between the plaintiffs and defendants whereby usury could arise."

It is an elementary principle that usury, as a defense, must be strictly proved.

Ewing vs. Howard, 7 Wallace 499.

But,

II. Even if it were conceded for the sake of the argument that the transaction was such as counsel for plaintiff in error contend, viz. "An agreement on demand to repay certain sums of money with legal interest from payment, * * * and in addition to the right to get his money back with interest, the further and additional advantage of holding the stock during the period of the option, and the opportunity of receiving dividends thereon," still the transaction was not an usurious one.

"A *bona fide* purchase of an annuity, even if the vendor has the option to re-purchase at a certain sum of money.

and though the effect be to give to the purchaser a greater rate of compensation for his money than the rate of interest allowed by law, is not usurious, unless it is a mere device to cover a usurious loan."

Lloyd vs. Scott, 4 Peters 205.

In this case McLean, J., says (p. 224) "The requisites to form an usurious transaction are three: 1. A loan either express or implied. 2. An understanding that the money loaned shall or may be returned. 3. That a greater rate of interest than is allowed by the statute shall be paid."

It must not be overlooked that the rate of interest mentioned in the contract, to-wit, 7 per cent. is the legal rate of interest in the State of New York where the contract was made.

"Where the contract on its face is for legal interest only, then it *must be proved* that there was some corrupt agreement or device, or shift to cover usury, and that it was in full contemplation of the parties."

Bank of U. S. vs. Wagginer, 9 Peters 399.

Hotel Co. vs. Wade, 7 Otto 13.

III. But what above all other things is conclusive against the imputation of usury to the contract in question is the principle laid down in Spain vs. Hamilton's Administrators, 1 Wallace 605, "where the promise to pay a sum above legal interest depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious."

The contract in this case provided for the payment of 7 per cent. legal interest. Conceding, for the sake of the argument, the correctness of the position of the plaintiff in error, that plaintiff below had a chance to realize dividends, the fact remains that the possibility of the receipt by him

of anything above the legal interest depended upon a very uncertain contingency, upon the happening of an event which was not certain, but very uncertain, and which in point of fact never did happen.

IV. But suppose we go a step further. If this was a loan at all, it must have been a loan to the Blair Iron and Steel Company. The stock was subscribed for while in the hands of a party acting as trustee for the company, and the money was paid directly into the Treasury of the company. Indeed, according to the statement of the counsel for the plaintiff in error, the object that the defendants had in entering into their contract with the plaintiff was to secure money for the corporation. If then the transaction in question was a loan, it was a loan of money to the corporation with the defendants as sureties. Such being the situation of the case, the defense of usury would not in any event be open to the defendants. It is provided by the New York Statute, (3 N. Y. Statutes at Large, 681) "no corporation shall hereafter interpose the defense of usury in any action."

In interpreting this statute, the Courts of New York have held that it repeals the statute of usury as to all contracts, obligations, etc., of corporations.

Rosa vs. Butterfield, 33 N. Y. 665.

If the corporation to whom the loan was made could not avail itself of the defense now set up, then neither could the defendants, the corporations sureties. And so it has been expressly held in a number of cases.

"The obligation, therefore, although agreeing to pay more than the rate of interest which individuals could lawfully pay, is a legal and valid one, therefore binding on the sureties as well as on the corporation."

Rosa vs. Butterfield, *Supra*.